Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

Bill J. Cory,
Petitioner

v.

Aztec Steel Buildings, Inc.,
Steel Factory Corporation,
Universal Steel Buildings, Corp.,
Arnold Davis,
Shawn Davis, and
Gary J. Bonacci,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. §1965 authorizes nationwide venue and service of process under §1965 (a) where the court jurisdiction is coextensive with the boundaries of the United States and only minimum contacts with the United States are required to satisfy due process, or under §1965 (b) where the court must have personal jurisdiction over one defendant before other parties not residing in the district may be brought into the district by showing that the "ends of justice" so require.

2. Whether the accrual of the statute of limitations starts on the discovery of the injury as compared to the date the injury occurred, and if so, can the accrual of the injury discovery be withheld, depending on the facts of the case, until the source of the injury is known; and can the accrual, as in this case, start two years before an injury occurs pursuant to 18 U.S.C. §1964 (c), and if the facts of the accrual date are disputed, is trial by jury required.

3. Whether the state of Kansas has personal jurisdiction in this case based on the minimum contacts required under 18 U.S.C. §1965 (a) or K.S.A. 60-308 (b), and, or statutory personal jurisdiction under K.S.A. 50-638.

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OPINIONS BELOW

Appendix A is found in the Court record. Appendices B and C are attached to this document.

The 8 November 2006 reported opinion of the Court of Appeals for the Tenth Circuit whose judgment is herein sought to be reviewed is reprinted in attached Appendix B, B-1. The Order filed 1 December 2006 denying the Petition for Rehearing is reprinted in Appendix B-15. The Memorandum and Order of the United States District Court for the District of Kansas entered 18 November 2006 is reprinted in Appendix B-16. The prior Memorandum and Order of the United States District Court for the District of Kansas entered on 5 April 2005 is reprinted in Appendix B-28.

JURISDICTION

Jurisdiction in the District Court of Kansas over the subject matter was found pursuant to Title 18 USC §§1964, 1341, 1343, and 2314;Title 28 USC §§1331 and 1332; and under the doctrine of pendant jurisdiction. Jurisdiction in the Tenth Circuit Court of Appeals was found under Title 28 USC §1291.

The Order and Opinion of the Court of Appeals for the Tenth Circuit was entered 8 November 2006. The Order denying the Petition for Rehearing was filed 1 December 2006. This Petition is timely under 28 USC §2101 (c). The jurisdiction of this Court is invoked pursuant to 28 USC §1254 (1).

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. §§1962 (c) and (d), 1964 (c) and 1965; and K.S.A. 60-308 (b) are reprinted in relevant part in Appendix C. K.S.A. 50-638 is reprinted in this document.

STATEMENT OF CASE

The Petitioner bought 125 American Steel Span arches to erect 5 Quonsets for the storage of hay from the Steel Factory, McKees Rocks, Pennsylvania in 1993. In June 1995, one barn blew down. New arches were purchased in 1995 and 1996, and a new replacement barn was erected in September 1996. In June 1999 a second barn collapsed due to wind, and in June 2001 the new replacement barn blew down. The Steel Factory manufactured American Steel Span Quonsets which it sold directly to customers throughout the United States. Universal Steel Buildings marketed the buildings and collected payment from customers. Aztec Steel Buildings delivered the arches directly to the customer's site of erection. Arnold Davis and Shawn Davis were the sole owners, officers and directors of all three corporations.

The Petitioner called the Steel Factory in November 2001 and made a written complaint in December 2001. The Steel Factory instituted a bogus investigation and never furnished the report as promised in May 2002. The Petitioner filed a complaint in the Office of the Kansas Attorney General under the Kansas Consumer Protection Act in August 2002. Mr. Gary Bonacci, the General Manager, responded by making false statements and causing false engineering reports to be provided the Attorney General. The case was dismissed in March 2003. In August 2003, the Petitioner filed a complaint under the Kansas Consumer Protection Act in the District Court, Republic County, Kansas, which the defendants

immediately removed to the federal district court by virtue of diversity of citizenship, 28 USC § 1332. The defendants continued their false statements in court which the court accepted as true and correct. The Petitioner filed his First Amended Complaint under the Federal RICO statute in April 2004.

The Steel Factory, the manufacturer of the steel arches, shipped the arches to the Petitioner's farm in Republic County, Kansas. Upon delivery, the Petitioner paid Universal Steel Buildings by certified check. The arches bought in 1995 and 1996 were shipped by Aztec Steel, and Universal Steel Buildings collected the payments.

Due to the Defendants refusal to furnish information in discovery, the Petitioner filed a motion to compel and the District Magistrate ordered the Defendants to comply. Upon receipt, the District Judge placed all exhibits received under a protective order to include packaging inspections and matters of public record. The Request for Production No. 6, Aztec Steel Buildings Components Shipped to 2nd Time Purchasers was significant. This document listed shipment to 171 customers in Kansas, and along with the shipments to the Petitioner, fulfilled the requirement for minimum contacts with the forum State. Finally, this document is part of the court record, and is attached to the Petitioner's Petition for Rehearing in the Tenth Circuit Court of Appeals.

On 5 April 2005, the District Court dismissed the Steel Factory for lack of personal jurisdiction. The court stated that the Steel Factory did not transact any business in Kansas...had no direct contacts with Kansas in the form of employees, offices, bank accounts, etc. In response to this Order, the Petitioner submitted Aztec Steel Buildings Components Shipped to 2nd Time Purchasers for review in open court and in camera. The Order of the District Court dated 12 October 2005 stated "the court is not persuaded that anything in these documents requires

reconsideration..."(Doc 105, p.1; Opening Brief, Exh. 10, 10th Cir.)

The Tenth Circuit, in its Opinion, did not discuss minimum contacts with the forum State, but merely stated that the Petitioner did not satisfy the "ends of justice" standard.

The two foregoing decisions by the Tenth Circuit and the District Court are substantial reasons for review by this Honorable Court.

The District Court of Kansas overruled its previously decided case which stated that Nationwide Venue and Service of Process was found under §1965 (d). In the present case, the court selected §1965 (b) as providing nationwide service of process. The Tenth Circuit stated a new precedent for the Circuit by stating §1965 (b) provides for Nationwide Service of Process. The Court differed in its interpretation of §1965 (b) from that of the District Court. A major reason for granting this writ is that the various circuits disagree as to whether §1965 (b), or (d) provide for nationwide service, and the variance among the circuits on how §1965 (b) is implemented.

A second major reason for this Honorable Court to grant the Writ is to determine the accrual of the statute of limitations, which is an overriding factor in many cases and of extreme importance to the parties involved. In one instance in this case, the Tenth Circuit decided the statute of limitations accrued two years prior to damages and a cause of action arose. Such an accrual rule is detrimental to all citizens in the Tenth Circuit, and sets them aside from all others in violation of the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Bill J. Cory, the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered in this matter on 8 November 2006.

NATIONWIDE VENUE AND SERVICE OF PROCESS

The conflict among the federal circuits in applying the nationwide venue and service of process authorized by Congress in RICO, 18 U.S.C §1965, prohibits the uniform application of the statute throughout the United States, causing the federal judicial system to act in violation of the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment. The Fourth and Eleventh Circuits have construed 18 U.S.C. §1965 (a) as authorizing venue for civil actions in any district in which the defendant "resides, is found, has an agent, or transacts his affairs", and 18 U.S.C. §1965 (d) as authorizing nationwide service of process. In this instance, §1965(d) provides a statutory basis for personal jurisdiction and a federal district courts jurisdiction is coextensive with the boundaries of the United States, requiring only that a defendant in a federal suit have minimum contacts with the United States to satisfy due process. *ESAB Group, Inc. v. Centricut, Inc.*, 126 F. 3d 617, 44 U.S.P.Q. 2d 1490, cert den. 118 S.Ct. 1364, 523 U.S. 1048, 140 L.Ed.2d 513 (4th Cir. 1997); *Republic of Panama v. BCCI Holdings (Luxembourg)S.A.*, 119 F.3d 935,942 (11th Cir. 1997).

Numerous district courts have ascribed to the foregoing theory to effect in personam jurisdiction of the federal courts under 18 U.S.C. §1965 (d). *Dooley v. United Technologies Corp.*, 786 F. Supp.65 (D.D.C. 1992); *University Savings Association v. Bank of New Haven*, 765

F. Supp. 35 (D.Conn. 1991); *American Trade Partners, L.P. v. A-1 Intern. Importing Enterprises, Ltd.*, 757 F. Supp. 545 (E.D.Pa 1991); *Omni Video Games, Inc. v. Wing Co. Ltd.*, 754 F. Supp 261 (D.R.I. 1991); *Obee v. Teleshare, Inc.*, 725 F. Supp. 913 (E.D. Mich 1989); *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 I. Supp. 1040 (S.D. N.Y. 1987); *Miller Brewing Co. v. Landau*, 616 F. Supp. 1285 (E.D. Wis 1985); *Deem v. Lockheed Corp.*, 749 F. Supp 1230, 1234 (S.D.N.Y. 1989); *Merchants National Bank v. Safrabank*, 1991 WL 173781 at *1 (D. Kan. 1991); *Headwear, U.S.A., Inc. v. Stange*, 166 F.R.D. 36, 38 (D. Kan. 1996). Although in 1986, the Ninth Circuit selected 18 U.S.C. §1965 (b) as providing personal jurisdiction and service of process for defendants residing outside the forum district court, the other circuits continued to use §1965 (d). *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 538-39 (9th Cir. 1986). In Butcher's Union, the court stated that if all defendants reside in one district, venue lie in that district. Further, if there were no district which had personal jurisdiction over all defendants, a district court must have personal jurisdiction over at least one defendant before the ends of justice requirement could apply.

In *PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.*, 138 F. 3d 65,70 (2nd Cir. 1998) the court stated that 18 U.S.C. §1965 (a) grants personal jurisdiction over an initial defendant in a civil RICO case to the district court where minimum contacts can be established. Nationwide service and jurisdiction over other parties not residing in the district is provided by §1965 (b) if the ends of justice so require.

In the Petitioners case before this Honorable Court, the Tenth Circuit followed the Second Circuit and decided that 18 U.S.C. §1965 (b), when raised in the proper venue, extended personal jurisdiction into "any judicial district of the United States" if necessary to satisfy the ends of justice. App B. B-4). A civil RICO action may be brought only in a

district court where personal jurisdiction can be established over at least one defendant, implying minimum contacts with the forum district. *Id.* P9.

In the District Court of Kansas, Judge Rogers held that RICO authorized nationwide service of process under 18 U.S.C. §1965 (d) in *Merchants National Bank v. Safrabank*, 1991 WL 173781 at *1 (D.Kan 1991). In the present case, Judge Rogers overruled his decision in *Safrabank* and found that §1965 (b) provided for nationwide service of process, but that §1965 (b) was inapplicable since the ends of justice requirement was not satisfied as all defendants were subject to suit in Pennsylvania. (App. B-33).

The foregoing demonstrates that it is imperative this Honorable Court decide the issue of RICO nationwide venue and service of process. The lower courts are in disarray leaving the courts and the parties in doubt as to established law and the manner in which to proceed.

ACCRUAL OF THE STATUTE OF LIMITATIONS

This Honorable Court stated in *Rotella v. Wood*, 528 U.S. 549, 554, 120 S.Ct. 1075, 145 L. Ed. 2d 1047 (2000), that two possibilities existed for the determination of the accrual of the 4 year statute of limitations set in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed. 2d 121 (1987): (1) an injury occurrence rule or (2) an injury discovery rule. The majority of the circuits have applied an injury discovery rule. *Grimmett v. Brown*, 75 F. 3d 506, 511 (C.A. 9 1996), cert. dism'd as improvidently granted, 519 U.S. 233, 117 S.Ct. 759, 136 L. Ed. 2d 674 (1997); *McCool v. Strata Oil Co.*, 972 F. 2d 1452 1464 (C.A. 7 1992); *Rodriguez v. Banco Central*, 917 F. 2d 664 (C.A. 1 1990); *Bankers Trust Co. v. Rhoades*, 859 F. 2d 1096 (C.A.2 1988); cert denied, 490 U.S. 1007, 109 S. Ct. 1642, 104 L. Ed. 2d 158 (1989); *Pocahontas Supreme Coal Co. v.*

Bethlehem Steel Corp., 828 F. 2d 211 (C.A. 4 1987); *Riddell v. Riddell Washington Corp.*, 866 F. 2d 1480 (C.A.D.C. 1989); *Love v. National Medical Enterprises*, 230 F. 3d 765 (5th Cir 2000); *Bath v. Buskin, Gaims, Gaines and Jonas*, 913 F.2d 817 (10th Cir. 1990). In *Bankers Trust Co. v. Rhoades, supra* at 1105, the court held that a separate accrual rule applied to civil RICO actions. Under this rule, each time the plaintiff discovers or should have discovered an injury caused by the defendant's violation of §1962, a new cause of action arises regardless of when the actual violation occurred. The plaintiff must then bring his action within four years of this accrual, plus any additional period which the statute of limitations may be tolled, to recover damages for this specific injury. The Fifth Circuit stated in *Love v. National Medical Enterprises, supra* at 724, 775, that the separate accrual rule was consistent with and based on the injury discovery rule adopted by the Fifth Circuit. For cases in which a pattern of RICO activity is alleged to have caused a continuing series of similar independent injuries, the court held that the *Bankers Trust* separate accrual rule applied in civil RICO actions.

In the present case, the Petitioner purchased five (5) Quonsets of 25 arches each for a total of 125 arches to be used for the storage of hay in March 1993. After the first barn blew down in June 1995, the Petitioner purchased 16 arches in 1995 and an additional 9 arches in August 1996 for a total of 25 arches to replace the blown down barn with a new barn. This new barn was erected in September of 1996. In June of 1999 a second barn blew down. The new barn which had been erected in September 1996 blew down in June 2001. The barns were delivered to his farms in 2' x 10' panels strapped to a pallet. The panels are bolted together into arches and erected as prescribed by the manufacturer.

The Tenth Circuit stated... "Cory was injured in 1993, 1995 and 1996 when he purchased the building

materials and replacement parts...and he was aware of his injury no later than June 1999, when the second building collapsed. Yet he failed to initiate litigation within four years of any of these dates. Therefore, all of the RICO claims were untimely under either the injury discovery or injury-occurrence rules." Further... "Cory's injury was complete when he purchased the allegedly defective buildings and parts." (App. B-13). Apparently the court applied the injury occurrence rule without considering the guidance provided in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S. Ct. 1984, 1990 (1997). In continuing to draw an analogy between RICO and the Clayton Act, *Klehr* stated that antitrust law provided that, in the case of a continuing violation, each overt act that is part of the violation and that injures the plaintiff starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times. 2 P. Areeda & H. Hoverkamp, Antitrust Law 9 338b, p. 145; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 806, 28 L. Ed. 2d 77 (1971).

The new barn erected in September 1996 was purchased by two additional separate contracts two and three years after the purchase of the original five barns. This barn was necessarily manufactured from different steel roll coils and the manufacturer has ample time to correct any flaws in building design, thusly, the purchase of this barn cannot be considered as part of the same violation that occurred in the purchase of the five barns in 1993. However, the court construed the statute of limitations for all barns to accrue in June 1999, a full two years before the third barn collapsed in June 2001. Three of the barns purchased in 1993 are still alive and without damage, but most incongruously if they should collapse the statute of limitations has already run. In the case of the third barn the statute of limitations could not have accrued prior to the time the barn collapsed as the Petitioner has not been injured in his business or property as required by 18 U.S.C.

1964 (c) . The statute of limitations accrued in June 2001 for the third barn when it collapsed and ran for four years until June 2005.

The Kansas Consumer Protection Act (KCPA), K.S.A. 50-623 et seq., has a three-year statute of limitations, K.S.A. 60-512(2). In the same vein, the third barn did not blow down until June 2001, and the statute of limitations could not have accrued in June 1999 since the Petitioner had not been damaged. In this case, the statute of limitations accrued in June 2001 and ran until June 2004, dictating that the filing of the case in August 2003 was timely.

When the first barn blew down due to the wind in June of 1995, the Petitioner bought a new barn and erected it in September 1996. When the second barn blew down, he attempted to determine the cause of failure, i.e., what enabled the wind to blow down the barn, the initial point of structural failure, etc. Several building contractors and others knowledgeable in the structure of buildings examined the blown down barn. The consensus was the same: the wind blew it down. It is common knowledge that the wind, produced by hurricanes, down-drafts, tornadoes, and so-called straight winds, acts in nefarious ways. At this time the source of damage was the wind. There was no evidentiary means to connect the defendants to the possible cause of failure. When the third barn blew down, the Petitioner knew the barns he had been furnished were defective in materials and/or engineering design. This barn was made from different steel-rolled coils and the manufacturer should have corrected any design deficiencies. The Petitioner, as the engineer overseeing the erection of the buildings, knew they had been properly emplaced in accordance with the manufacturers guide. (Doc. 85, p. 10, 11).

The Petitioner called the manufacturer, the Steel Factory, in November 2001 and wrote a letter requesting replacement costs and damages in December 2001. (Doc.

25, Exh. 9). The manufacturer is the only one who has the design specifications and the capability to determine the cause of failure. The Steel Factory initiated an investigation and led the Petitioner to believe some remedy would be provided commensurate with the results of the investigation. The final report of the investigation, which the Steel Factory stated had been furnished to the Petitioner in May 2002, was never received by him. (Doc. 25, pp. 9, 10, 19, 20; Doc. 85, p.11). The Steel Factory fraudulently misrepresented that it would investigate and render a report on its findings, some of which might be favorable to the Petitioner, and in so doing, lulled him into waiting for the report. The failure to render the report concealed any design flaws that may have been discovered or other circumstances that contributed to the buildings failure. *Coffey v. Stephans*, 3 Kan. App. 2d, 596, 598, (1979).

On 7 August 2002, the Petitioner filed a complaint with the Office of the Kansas Attorney General, Consumer Protection Division, under the Kansas Consumer Protection Act. The Steel Factory retained an engineer, Mr. Terry Gartner, to investigate the failed buildings. Mr. Gartner found the distance between the two footers was 4 inches too wide. However, the Steel Factory has furnished a foundation guide revised in 1998 which designated spacing between footers that was 4 inches less than the foundation guide furnished the Petitioner in 1993. Next, the Steel Factory sent Mr. Stephan Maslin, the engineer who designed the buildings, to inspect and determine the cause of failure of the collapsed buildings. Mr. Maslin's report stated that the foundation guide required a concrete slab between the footers to prevent rollover. The foundation guide clearly set forth the barns could be emplaced with or without a concrete slab, depending upon the preference of the owner. The foregoing is well documented in the First Amended Complaint and the record. (Doc. 25, pp. 11-13, 22; Doc 85, pp. 12-13; Opening Brief p. 13, 10th Cir.). The Petitioner retained the most noted structural engineering

firm in Kansas, Finney & Turnipseed, to examine the buildings. They found the footers held, and that the steel arches blew down due to the force of the wind. (Doc. 85, Exh. 5, pp. 4,5) the Office of the Attorney General dismissed the case on 12 March 2003. (Doc. 25, p. 13, 21. Opening Brief, pp. 12, 13, 10th Cir).

Two additional frauds were noted as a result of discovery. The terms of the contract stated that the Steel Factory would provide the Petitioner with Military Quonsets (Doc. 25, Exh. 1). The Petitioner believed he had received Quonsets of superior structural strength made to military specifications until he received the Defendant's Response to Plaintiffs Motion to Compel, which stated they did not manufacture Military Quonsets. The stress calculations in Defendants Aztec Steel Buildings Inc. and Steel Factory Corporations Responses to Plaintiffs First Request for Production of Documents were flawed beyond all reason. The engineering method used showed the Steel Factory did not know how to design a steel arch building. (Doc. 85, p. 8; Opening Brief, p. 14).

It was imperative that the cause of building failure be determined for trial. Structural engineers for the design of four-sided straight-wall buildings are readily available. The steel arch building industry is small, and the manufacturers have not formed a trade association that can be located. Since a steel arch building engineer was unavailable, the Petitioner decided to attempt the design analysis. Simply put, the force of the wind did not blow down the buildings, but rather the vibration of the steel due to the wind caused the collapse. Quonsets are thin-walled steel arch buildings which have no internal support, but which are designed so that the thin-shell supports itself. When the frequency of the wind is the same as the frequency that causes the thin-shell to vibrate, the successive vibrations increase in amplitude and may become very large unless limited by damping. In this case, the manufacturer failed to incorporate proper damping

techniques and the buildings merely collapsed due to excessive vibration. The Petitioner completed his engineering analysis in January 2005, and this was the first time he could correlate the buildings cause of failure directly to the Steel Factory, and state with specificity that the collapse of the buildings was due to improper design practices and techniques.

This case concerns a federal question and the accrual of the statute of limitations is determined by federal law. In *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1940), Justice Frankfurter stated:

> "...where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." Citations omitted. "This equitable doctrine is read into every federal statute of limitations."

In Kansas the discovery of fraud was addressed in *Wolf v. Brungardt*, 215 Kan. 272, 281, 282; 524 P. 2d 726 (1974). The Kansas Supreme Court stated:

> "many decisions of the court hold the law does not deprive a defrauded party of relief because he had an opportunity to investigate when his lack of knowledge was such that the investigation would disclose nothing to him."

The Plaintiff practiced due diligence and could not have filed this case in June 1999 for he could prove nothing, and it would have left him without relief. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S. Ct. 1984, 1986, 138 L.Ed. 2d 373 (1997). Due to the conduct of the Steel Factory during its investigation of the cause of failure of the buildings and the subsequent Kansas Attorney General case, when it merely rendered false statements to conceal and circumvent any responsibility, the statute of limitations should be tolled

beginning in December 2001 through March 2002. (Opening Brief, pp. 14, 15, 10th Cir.; Doc. 25, p. 22; Doc. 85 pp. 13-15).

The District Court in its Memorandum and Order dated 18 November 2005 granted summary judgment for all RICO claims for failure to establish a pattern of racketeering activity. (App. B-26, 27; Opening Brief, pp. 15-17, 10th Cir; Doc. 85, p.4). However, the Court found that the RICO claim for the building which blew down in June 2001 was not time-barred, but that all state law claims were time-barred. (App. B-23, 24). Using the injury discovery/separate accrual rule adopted by the Tenth Circuit in *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817, (10th Cir. 1990) the RICO claim was time-barred in June 2005 and under Kansas law the state law claims were time-barred in July 2004. The Tenth Circuit, without mentioning the pattern of racketeering activity decision by the lower court, stated that all RICO claims were untimely as his injury was complete when he purchased the buildings in 1993, 1995, and 1996. (App. B-12, 13). The Court then proceeded to state the statute of limitations accrued in June 1999 for the barns which blew down in 1995 and 1999, and, most outstandingly, for the barn which blew down in June 2001 and, as a consequence, the remaining three barns which are still standing. The Tenth Circuits decision is quixotic for in 1999 there was no damage to the barn which blew down in 2001, and there is still no damage to the remaining three barns.

The deliveries of defective barns are predicate acts, but the collapse of the barns in 1995, 1999, and 2001 is distinguished due to the fact there are now RICO injuries, each with corresponding provable damages. The Petitioner needed only to find a source of his injury other than the wind or, in some manner, demonstrate that acts of the defendants enabled the wind to blow down the barns, and he could file suit. This appeared to be a simple task, but as previously stated, there were no engineers in Kansas that

could do the job, or engineering information available on the collapse of steel arch buildings due to wind. The Petitioner set forth to do the engineering analysis which he considered to be unfeasible, since there was no information that it has ever been accomplished heretofore. After the completion of his engineering analysis of the structure design and corresponding flaws in design, the Petitioner consulted with a prominent university professor of structural engineering who affirmed that he has resolved the most probable cause of building failure. The professor also stated this was the same engineering theory that caused the Tacoma suspension bridge to collapse in 1940 which, in that case, required several Canadian and U.S. engineers a few years to resolve. The level of difficulty in determining the actual cause of failure, and therefore the source of injury, is far greater and in-opposite to asking someone in the medical profession of which there are many, of the prevailing standards of medical practice as stated in *Rotella, supra* at 557. Currently, there are several suits at law in the Gulf states to determine whether *the source of water damage* was due to hurricane winds or flooding as each require a different type of insurance policy.

The Tenth Circuit rendered summary judgment and stated that all claims were time-barred (App. B-14). The accrual of the statute of limitations is well-disputed, beginning in the First Amended Compliant, and there exists genuine issues of material fact regarding whether the doctrine of equitable estoppels tolls the statute of limitations so as to defeat summary judgment. *Tiberi v. Cigna Corp.*, 89 F. 3d 1423, 1430 (10th Cir. 1996). A viable issue of fact as to when the limitations period began remains, demanding a full factual hearing before a jury on the question of when the statute of limitations commenced to run. *Wolf v. Preferred Risk Life Insurance Co.*, 728 F. 2d 1304, 1307 (10th Cir. 1984).

The Tenth Circuit erred in not applying the separate accrual rule in *Bath, supra*, at 820, to the barn which blew

down in 2001, and remanding for trial by jury the determination of when the Petitioner discovered his source of injury and of the applicability of the doctrine of equitable estoppel, and thereby the date of the accrual of the statute of limitations.

PERSONAL JURISDICTION – MINIMUM CONTACTS

The lower courts have used varying criteria in applying the doctrine of minimum contacts to satisfy personal jurisdiction. The court may exercise jurisdiction over a nonresident defendant if that defendant has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Specific jurisdiction may be obtained if a defendant purposefully directed his activities at residents of the forum and injuries arise out of or relate to those activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). A court may exercise general jurisdiction when the defendants contacts with the forum state are continuous and systematic, and they deliver products into the stream of commerce which are purchased by consumers in the forum. *Id.* 473. The difficulty arises when the lower courts attempt to assess the kind, type, and quantity of contacts necessary to satisfy personal jurisdiction.

In *Nichols v. G.B. Searle & Co.*, 991 F. 2d 1195 (4th Cir. 1993) the court held that a Maryland court could not assert general jurisdiction over a company that employed 13 Maryland residents as sales representatives and one as a district manager, held three district and two national meetings annually, and has between 9 million and 13 million annual sales in Maryland. In the Petitioners attempt to register a Kansas judgment in Arkansas, the Arkansas

Court of Appeals in Cory v. Keeling, CA 02-440 (2003) found that hay produced and purchased in Kansas by an Arkansas resident, whose agent hauled the hay to Arkansas, demonstrated that the Arkansas resident purposely availed himself of the privilege of doing business in Kansas, satisfying the minimum contacts required for personal jurisdiction. (App B-41; Reply Brief of Appellant, Exh.1, 10th Cir.). The Petitioner recognizes that specific and general jurisdiction are dissimilar, but the distinctions within and between the two concepts are so varied and spread-out among the various cases as to defeat consistent application by the lower courts.

The Steel Factory manufactured and sold steel arch buildings under the trademark of American Steel Span, throughout the United States, by selling directly from the factory. Two sister corporations at the same location in McKees Rocks, Pennsylvania, supported these factory direct sales. Universal Steel Buildings, the marketing arm of the Steel Factory, was responsible for sales and payment from the buyer. Aztec Steel Buildings delivered the buildings to the buyer at his location. Arnold Davis and Shawn Davis were the sole owners, officers, and directors of all three corporations.

The Petitioners received a letter offering to sell American Steel Span buildings manufactured in McKees Rocks, PA, signed by Lou Harvilla as the General Manager of the Midwest Region of American Steel Span (D-25, Exh. 3), and a brochure on American Steel Span buildings (D-87, Exh. 1) in March 1993. On or about 30 March 1993, he signed a purchase order in his home at Concordia, KS for 125 American Steel Span arches designated as Military Quonsets. (D-25, Exh. 4, pp 1&2). The cost was $25,079.00 and the Petitioner made a deposit to $6,000.00 that day by personal check to the seller's representative, Lou Harvilla.

The arches were *shipped by the Steel Factory* on 16 April 1993 (D-25, Exh. 3) and upon delivery the Plaintiff

paid the delivery truck driver $19,079.00 by certified check made payable to Universal Steel Building Corp. (D-95, Exh.5), who hand-carried the check back to Pennsylvania.

On or about 21 August 1995, the Petitioner ordered 16 steel arches and mailed a $1,000.00 deposit to Lou Harvilla's sales office, Midwest Steel Span by personal check. These arches were *shipped by Aztec Steel* on 14 September 1995 and upon delivery to his farm, he paid $3,100.00 to the truck driver who hand-carried the certified check made payable to American Steel Span back to Pennsylvania (D-25, Exh. 4).

An additional 9 arches were ordered directly from Universal Steel Buildings Corp. at McKees Rocks, Pennsylvania and paid in full by personal check in the amount of $2,475.00, dated 5 August 1996, made payable to and mailed to Universal Steel Buildings (D-25, Exh. 6). These arches were *shipped by Aztec Steel* on 26 August 1996. (D-25, Exh. 6).

All these shipments *were delivered by the manufacturer* to the Plaintiffs farm in Republic County, and the purchase orders were signed and payments made in Kansas, satisfying the minimum contacts requirements. (D-75, p.9).

The fact that the salesmen at Midwest Steel Span sold only American Steel Span products, sets forth that the salesmen had agreed to serve as sales agents exclusively for American Steel Span products. Mr. Bonacci, the General Manager, stated in his letter to the Kansas Attorney General that the buildings were specifically designed for Cloud County, KS with the ascertained 25 lbs/ft snow loading and 81 mi/hr wind speed requirement. (D-26, Exh. 12). Justice O'Connor stated in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed. 2d 92 (1987):

> "additional conduct of the defendant may indicate an intent or purpose to serve the market in this forum state, for example, *designing the product for*

> *the market in the forum state*, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has *agreed to serve as sales agent* in the forum state." (Emphasis added).

The foregoing sets forth the intent of the Defendants to specifically market the Quonsets in Kansas. (Opening Brief, p. 6, 10th Cir.).

In discovery, the Defendants furnished Request for Production No. 6, *Aztec Steel Buildings Components Shipped to 2nd Time Purchasers* which listed approximately 4,180 shipments made to customers throughout the United States. (Opening Brief, Exh. 9; Petition for Rehearing, attached complete copy of Exh. 9). Kansas residents received 171 of these shipments. Since these were 2nd time shipments there had to be a first time shipment, doubling the number of shipments to Kansas to at least 342 sales. The steel factory manufactured 342 products sold in Kansas. Aztec steel shipped 342 products to Kansas, and Universal Steel was paid by Kansas residents for 342 products. The corporations had a total of 1,026 contacts with the state of Kansas but claim they are not doing business in Kansas. (D-87, pp. 9-10, Exh. 6); D-119, p. 35). The Petitioners first time order was for $25,000. If all first time orders averaged a similar amount, the corporations sold $4,275,000.00 worth of products in Kansas. (Opening Brief, p. 9, 10th Circuit). These direct shipments show the corporations purposefully targeted the forum state. *Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 282 (3rd Cir. 1994). Since the corporations purposedly directed their activities at residents of Kansas, and the Petitioners injuries arose out of these activities, the state of Kansas may properly exercise personal jurisdiction over the Steel Factory, Aztec Steel and Universal Steel Buildings. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L. Ed. 2d 528 (1985).

The Tenth Circuit decided all the foregoing by stating "The district court first observed that, instead of offering any evidence or argument concerning SFC's direct contacts with Kansas, Cory claimed that Midwest Steel Span acted as SFC's agent in Kansas....on appeal, Cory makes no agency argument. Consequently, our consideration of this matter ends....Regarding the Davises' and the Bonacci's contacts with Kansas, the district court observed that Cory only offered evidence that Bonacci had responded to an inquiry from the Kansas Attorney General about Cory's claims. The district court ruled that this limited contact was insufficient to confer jurisdiction. On appeal, Cory does not argue otherwise, and we do not consider the matter further. See *Id.* We conclude that the district court did not err in dismissing SFC, the Davises, and Bonacci for lack of personal jurisdiction." (App. B-11).

The Tenth Circuit failed to review personal jurisdiction de novo or even practice due diligence in reading the Opening Brief. The total lack of consideration by the Tenth Circuit, of the facts and argument presented, resulted in injustice to the Petitioner which now must find remedy in this Honorable Court.

The Petitioner signed a purchase order to buy 125 American Steel Span steel arches, Model-Military Quonset, on 30 March 1993. The Steel Factory consummated the contract when it delivered the arches to his farm in Kansas. (D-85, pp. 6-7, Exh. 1 pp.1-2) He filed suit under the Kansas Consumer Protection Act, Count V: Violation of K.S.A. 50-626 & 50-627, First Amended Complaint. (D-25, pp.19-24). The Act has its own jurisdiction and venue provisions. K.S.A. 50-638 states:

> (a) Jurisdiction. Any supplier, whether or not a resident or citizen of this state, who in person or through an agent or instrumentality, engages in a consumer transaction in this state, thereby submits the supplier to the jurisdiction of the courts of this

> state as to any cause of action arising from such consumer transaction.
>
> (b) Venue. Every action pursuant to this act shall be brought in the district court of any county in which there occurred an act or practice declared to be a violation of this act, or in which the defendant resides....If the defendant is a nonresident and has no principal place of business within this state, then the nonresident defendant can be sued either in the district court of Shawnee County, or in the district court of any county in which there occurred an act or practice declared to be a violation of this act.

The act applies to any consumer transaction which is defined as the "sale, lease, assignment or other disposition for value of property or service within this state...to a consumer or a solicitation by a supplier with respect to any of these dispositions." K.S.A. 50-624 (c). Further, the act defines a supplier as "a manufacturer, distributor, dealer, seller,....or other person who, in the ordinary course of business solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer." K.S.A. 50-624 (i). No privity is required. *Bailey v. Morgan Drive-Away, Inc.*, 647 F. Supp. 648 (D. Kan. 1986). The corporations have not contended they were not suppliers as defined by the Act. The facts of this case dictate that the state of Kansas has statutory personal jurisdiction over the Pennsylvania corporations. (K.S.A. 60-308 (b))

Arnold Davis and Shawn Davis were the sole owners, officers and directors of the Steel Factory, Aztec Steel, and Universal Steel Buildings. The Steel Factory was a sub-chapter S corporation so that all money was passed through to the Davises directly with only a book-entry notation in the Steel Factory records. (Opening Brief, Exh. 8, p. 2; D-119, p. 28). It is not possible to distinguish their own affairs from those they took on behalf of the corporations they owned and controlled. They enjoyed

positions within the businesses they controlled such that the affairs of the corporations were in reality their own affairs. *Miller Brewing Co. v. Landau*, 616 F. Supp. 1285 (E.D. Wis. 1985). The acts of the corporations are attributable to the Davises, and therefore the Davises are subject to the same personal jurisdiction as the corporations. Mr. Gary Bonacci is the General Manger of all three corporations. He instituted the sham investigation of the collapsed barns and deceived the Petitioner by causing him to believe the cause of failure would be determined, and restitution provided if appropriate. The Petitioner diligently furnished all information requested, but no report was ever furnished. Mr. Bonacci defended the action in the Office of the Kansas Attorney General, and during this time rendered false statements and caused the engineers he retained to render untrue reports. During the period from December 2001 to March 2003, Mr. Bonacci contacted the Petitioner and the office of the Attorney General several times, fulfilling the minimum contacts requirement for personal jurisdiction of the Kansas forum.

The weight of contacts test dictates that venue and jurisdiction lie in the state of Kansas. The actions which took place in Kansas were set forth in the "ends of justice", Opening Brief, 10th Cir. p.5:

> "2. The "Ends of Justice" has no specific definition, but takes various forms. The Plaintiff signed three purchase orders in Kansas. He made two money deposits in Kansas and he made three large sum payments to complete the terms of the contract in Kansas. These payments were made directly to the Defendants in Pennsylvania. All three contracts were consummated in Kansas when the Defendants delivered steel arches to his farm in Republic County, Kansas, and the scheme to defraud the Plaintiff came to fruitation in Kansas when he made payments totaling over $30,000. Three barns blew down in Kansas in 1995, 1999, and 2001. Therefore

> he sustained damage and the claim arose in Kansas. All witnesses are located in Kansas except the individual defendants. Both the Plaintiffs and Defendants expert engineering witnesses are located close to the Kansas court. Two blown down barns are available for jurors to view should it become necessary. The Defendants are represented by counsel in the Kansas court. The only reason to have trial in PA is for the convenience of the Defendants. The case has been in the Kansas courts approximately 2 ½ years with the associated costs. Foreclosing the Kansas action and starting over again, with all new litigation costs in PA along with the long distance between Kansas and PA, would prohibit further action by the Plaintiff. The Plaintiff submits "the ends of justice" require that proper venue lie in the District of Kansas pursuant to 28 USC § 1391 (b) & (c) and 18 USC § 1965. *Miller Brewing Co. v. Landau*, 616 F. Supp. 1285 § E.D. Wis 1985)."

In its Opinion, page 12, the 10th Circuit stated:

> "And in the current case, we have Cory's assertion that the ends of justice require nationwide service simply because he has sustained damages and litigation costs on Kansas.[4] We conclude, as a matter of law, that such facts, standing alone, do not satisfy the "ends of justice" standard." (App. B-12)

The Court misquoted the Petitioners "ends of justice" statement and, therefore, necessarily failed to give proper consideration as to whether or not the "ends of justice" requirement has been satisfied.

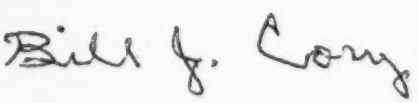
> "[4] Cory does not claim a financial impediment to suit in Pennsylvania."

CONCLUSION

The lack of uniformity among the Circuits in setting the requirements for venue and service of process demands the attention of this Honorable Court to determine the standards for Nationwide Venue and Service of Process, Title 18 USC § 1965, in the best interests of justice. Although RICO was enacted over 35 years ago, the accrual of the statute of limitations has not been determined, resulting in diverse opinions in the circuits as to when the limitation of actions began to run. The Tenth Circuit accrual rule of allowing the statute of limitations to commence to run before an economic injury occurs, if allowed to stand, will cause the Petitioner irreparable harm now and quite likely into the future, along with all others.

WHEREFORE, for the foregoing reasons, the Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,



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6 February 2007

APPENDIX B

PUBLISH
STATES COURT OF APPEALS

TENTH CIRCUIT

BILL J.CORY, Plaintiff-Appellant, v. AZTEC STEEL BUILDING INC,; UNIVERSAL STEEL BUILDINGS CORPORATION a PA corporation; GARY J. BONACCI; SHAWN DAVIS; ARNOLD DAVIS; STEEL FACTORY CORPORATION, Defendants-Appellees.	FILED United States Court of Appeals Tenth Circuit November 8, 2006 Elizabeth A. Shumaker Clerk of Court No. 06-3051

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. No. 03-CV-4193-RDR)

Submitted on the briefs:*
Bill J. Cory, pro se, Appellant.
James C. Morrow, Morrow, Willnauer and Klosterman, L.L.C., Kansas City, Missouri, for Appellees.

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* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34 (f); 10th Cir. R. 34.1 (G). The case is therefore ordered submitted without oral argument.

Before **O'BRIEN, PORFILIO,** and **ANDERSON,** Circuit Judges.

ANDERSON , Circuit Judge.

In this pro se appeal, appellant Bill J. Cory challenges district court orders that dismissed various defendants for lack of personal jurisdiction and granted the remaining defendants summary judgment on Cory's racketeering, consumer-protection, and product-liability claims. We exercise jurisdiction under 28 U.S.C. § 1291, and we affirm.

BACKGROUND

In 1993, Cory, a Kansas farmer, executed a purchase order for five Quonset-style buildings from Midwest Steel Span, which is located in Overland Park, Kansas. Apparently, Midwest then either sold or transferred the purchase order to Universal Steel Factory of Kansas City, Missouri, which placed the order with defendant Steel Factory Corporation (SFC) in Pennsylvania. Cory received the building materials and paid defendant Universal Steel Buildings Corporation (USBC), which is also located in Pennsylvania. Cory erected the buildings.

In 1995, after one of the buildings collapsed in the wind, Cory ordered replacement parts. Defendant Aztec Steel Building, Inc. (ASB), another corporation located in Pennsylvania, shipped the parts to Cory. In 1996, Cory ordered more replacement parts and finished repairing the building.

In June 1999, another building collapsed in high winds. And in 2001, the building that Cory had repaired in 1996 collapsed again in the wind. Cory complained to Defendant Gary Bonacci, SFC's plant manager, and then to the Kansas Attorney General's consumer protection division. Bonacci had the buildings inspected by an engineer, who concluded that "the mode of failure in both

buildings appears to be from a lack of resistance to foundation rotation. The buildings should have had a concrete slab...as described in the foundation manual." 1 Record on Appeal (ROA), Doc. 81, Ex. M at 3. Cory retained an engineer, who simply opined that "the steel arch framing of both of these structures failed from forces exerted on them from wing." *Id.*, Doc. 48 at 5. In March 2003, the Attorney General's office concluded that there had been no violation of the Kansas Consumer Protection Act.

In August 2003, Cory, aided by counsel, sued ASB and USBS in Kansas state court. The defendants removed the case to the United States District Court in Kansas, where Cory filed an amended complaint, naming, as additional defendants, SFC, Bonacci, and Arnold and Shawn Davis, officers of the corporate defendants. The complaint asserted violations of 18 U.S.C. §§ 1961-1968 (the Racketeer Influenced and Corrupt Organizations Act (RICO)), in addition to Kansas's consumer-protection and product-liability laws. The district court first dismissed SFC, Bonacci, and the Davises for lack of personal jurisdiction, explaining that neither RICO nor the Kansas long-arm statute conferred jurisdiction. Then, the district court granted ASB and USBC summary judgment, ruling that Cory's RICO claims were time-barred to the extent they alleged injury from the 1995 and 1999 incidents, that the remaining RICO claims failed to show a pattern of racketeering activity, and that Cory's state-law claims were time-barred.

Cory appeals.

DISCUSSION

I. Personal Jurisdiction

"We review de novo the district court's dismissal for lack of personal jurisdiction." *Benton v. Cameco Corp.*, 375 F. 3d 1070, 1074 (10th Cir. 2004). Where, as here, a dismissal is entered without an evidentiary hearing, the

plaintiff need only make a prima facie showing of personal jurisdiction. *Id.* We resolve any factual disputes in the plaintiff's favor in determining whether that burden has been met. *Id.* At 1075.

Service of a summons is a means of establishing a court's jurisdiction over a defendant. 1 James Wm. Moore et al., Moore's Federal Practice § 4.03[1] (3d ed. 2006). This case requires that we assess the territorial limits of such service. Consequently, we consider first the federal, and then the state statutory bases that would allow the federal district court in Kansas to reach into Pennsylvania to acquire jurisdiction over SFC, Bonacci, and the Davises.

A. RICO

Cory argues that the district court should have followed the Fourth and Eleventh Circuits and ruled that RICO provides a statutory basis for personal jurisdiction over "any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(d). The defendants counter that the district court followed the better reasoned decisions of the Second, Seventh, and Ninth Circuits, which hold that RICO, when raised in the proper venue, extends personal jurisdiction into "any judicial district of the United States" if necessary to satisfy "the ends of justice." *Id.* § 1965(b). For the reasons expressed below, we join the Second, Seventh, and Ninth Circuits and hold that subsection (b) of § 1965, rather than subsection (d), gives RICO its nationwide jurisdictional reach.

Where Congress has statutorily authorized nationwide service of process, such service establishes personal jurisdiction, provided that the federal court's exercise of jurisdiction comports with Fifth Amendment due process. See *Peay v. BellSouth Med. Assistance Plan*, 205 F. 3d 1206, 1209 (10th Cir. 2000). Our initial inquiry, then, is whether RICO's service of process provision, § 1965,

potentially confers jurisdiction by authorizing service of process. In relevant part, the statute provides:

> (a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.
>
> (b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States....
>
> (c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district....
>
> (d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, as an agent, or transacts his affairs.
>
> 18 U.S.C. § 1965

In 1986, the Ninth Circuit identified subsection (b) as providing for service of process upon, and the conferral of personal jurisdiction over, defendants residing beyond the federal court's district. *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F. 2d 535, 538 (9th Cir. 1986). The court did not, however, address subsection (d)'s service provision. The following year, the Seventh Circuit followed the Ninth, stating that subsection "(b) creates personal jurisdiction by authorizing service." *Lisak v. Mercantile Bancorp, Inc.*, 834 F 2d 668, 671 (7th Cir. 1987). But it too did not mention subsection (d). That subsection did not rise to circuit-court prominence until ten years later, when the Eleventh Circuit

identified subsection (d) as projecting personal jurisdiction nationwide. *Republic of Panama v. BCCI Holdings* (Luxembourg) S.A., 119 F.3d 935, 942 (11th Cir. 1997). But that court did "not pause long over the ...question," and oddly, it cited *Lizak* for support. *BCCI Holdings*, 119 F.3d at 942. The Fourth Circuit soon joined the fray, settling on subsection (d). *ESAB Group, Inc. v. Centricut, Inc.*, 126 F. 3d 617, 627 (4th Cir. 1997). But the court did not observe the contrary position of the Seventh and Ninth Circuits, and it only mentioned subsection (b) in passing, characterizing it as a venue provision. *Id.*

The first federal appellate court to actually analyze § 1965's full text and offer reasoning for its choice of subsections was the Second circuit. In *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F. 3d 65(2nd Cir. 1998), the court conducted a comprehensive and sequential reading of the statute, concluding that subsection (b) is the correct jurisdictional provision. The court based its conclusion on three points. First, subsection (a) sets venue in "any district in which [a defendant] resides, is found, has an agent, or transacts his affairs,' 18 U.S.C. § 1965(a), thereby suggesting that an "action can only be brought in a district court where personal jurisdiction based on minimum contacts is established as to at least one defendant," *PT United*, 138 F. 3d at 71. Second, subsection (b) authorizes service of a summons on "other parties" residing beyond the venued district if necessary to further the "ends of justice." *Id.* (quoting 18 U.S.C. § 1965(b)). By imposing the quoted limitations, Congress expressed a preference that defendants not be unnecessarily haled into unexpected forums. *Id.* at 72. And third, subsection (d)'s reference to "'[a]ll other process'" must mean process different than a summons or a government subpoena, both of which are dealt with in previous subsections. *Id.* at 72 (quoting 18 U.S.C. § 1965(d)).

We find this reasoning persuasive and consistent with congressional intent.[1] In its report on the Organized Crime Control Act of 1970, which gave birth to RICO, the House Judiciary Committee declared that '[s]ubsection (b) provides *nationwide service of process*...in actions under section 1964 [providing civil remedies for RICO violations]," and that "[s]ubsection (d) provides ...all other process in actions under the [entire RICO] chapter." H.R. Rep. No. 91-1549 (1970), *reprinted* in 1970 U.S.C.C.A.N. 4007, 4034 (emphasis added). Further, the committee stated that 1965 is "modeled on present antitrust legislation." *Id.* Justice Jackson summarized the venue and jurisdictional contours of antitrust legislation in *United States v. National City Lines*:

> The scheme of the [antitrust] statutes [2]...is that the Attorney General may lay the venue in any district where he may properly serve one or more of his defendants. He may go ahead with his action against them, whether he is allowed to bring in others or not. Before he can bring in other parties than those properly served in the district, i.e., those 'inhabitant,' 'transacting business,' or 'found' there, it must be made to appear to the court that the ends of justice require that they be brought before the court, in which case they may be summoned from any district.

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1 When a statute is ambiguous, we may examine legislative history to ascertain the statute's meaning. *State Ins. Fund v. S. Star Foods, Inc. (In re S. Star Foods, Inc.)*, 144 F.3d 712, 715 (10th Cir. 1998) (commenting that a 'split in the circuits is, in itself, evidence of...ambiguity" when a statute's "meaning is not evident based on the plain language").

2 For instance, Section 12 of the Clayton Act provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or

334 U.S. 573, 598 (1948)(Jackson, J., concurring)(quoting 15 U.S.C.§ 22). This explanation coincides with our reading of § 1965, subsections (a) and (b): When a civil RICO action is brought in a district court where personal jurisdiction can be established over at least one defendant, summonses can be served nationwide on other defendants if required by the ends of justice.

Next, we turn to whether 1965, as interpreted above, actually conferred personal jurisdiction over SFC, Bonacci and the Davises. The district court did not determine whether there was jurisdiction over at least one defendant so that other defendants could be served nationwide to further the ends of justice. Instead, the district court proceeded directly to the "ends of justice" requirement and ruled that it was not met simply because all of the defendants were subject to suit in Pennsylvania. We disagree with the district court's interpretation of the "ends of justice," as it comports with neither the congressional directive to "liberally construe [ ] [RICO] to effectuate its remedial purposes," H.R. Rep. No. 91-1549 (1970), *reprinted* in 1970

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[2] (continued)
transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22. and Section 15 of the Clayton Act provides:

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations....Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

15 U.S.C. § 25. *Accord id.* §§ 4 & 5 (Sherman Act), 9 7 10 (Wilson Tariff Act).

U.S.C.C.A.N. 4007, 4036, nor the antitrust legislation on which RICO was modeled, *see id.* at 4034.[3]

RICO was intended as a means to eradicate organized crime. *See* Organized Crime control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923. That purpose is not furthered by withholding nationwide service of process whenever all of the RICO defendants could be haled into one court for a single trial. While the district court's construction of the "ends of justice" might promote judicial economy, it might also mean that some RICO violations would go unpunished whenever organized criminals operate within the same locale and cause harm in a distant state. Insulating such a criminal enterprise from liability, when, for instance, the victim is unable to finance long-distance litigation, is not consistent with Rico's purpose.

The district court's construction is also not in accord with antitrust legislation. As noted above, the Clayton, Sherman, and Wilson Tariff Acts all prescribe an "ends of justice" analysis for allowing "other parties" to be summoned before the court, "whether they reside in the district in which the court is held or not." 15 U.S.C. §§ 5 (Sherman Act), 10 (Wilson Tariff Act), & 22 (Clayton Act). The Supreme Court has rejected the notion that a confluence of defendants within a single judicial district controls the "ends of justice" analysis. *See Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 46 (1911) (stating that personal jurisdiction had properly been acquired over nonresident defendants under the Sherman Act's "ends of justice" provision, as one of the many defendants was present within the district); *see also United States v. Standard Oil Co. of N.J.*, 152 F. 290, 296 (C.C.E.D. Mo. 1907)(providing

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[3] The district court's failure to resolve whether it had personal jurisdiction over at least one defendant does not require remand because, while we disagree with the district court's construction of the "ends of justice" standard, we conclude *infra* that the standard is not met in this case.

further background on the personal jurisdiction issue decided in *Standard Oil*, 221 U.S. at 46, by rejecting the nonresident defendants' argument that "the ends of justice: would be better served if they were summoned into court "in the district of the inhabitancy of a larger number of the defendants").

Accordingly, we conclude that the "ends of justice" analysis is not controlled by the fact that all defendants may be amenable to suit in one forum. In so holding, we disagree with the Ninth Circuit, which reached the contrary conclusion by inadequately considering the congressional intent underlying RICO and by ignoring federal antitrust legislation. *See Butcher's Union*, 788 F.2d at 539 (stating, without elaboration, that the lower court had properly considered RICO's purpose "and the phrase's location in the section providing for nationwide service of process"). We need not, however, offer a competing definition, as the "ends of justice" is a flexible concept uniquely tailored to the facts of each case. And in the current case, we have Cory's assertion that the ends of justice require nationwide service simply because he has sustained damages and litigation costs in Kansas.[4] We conclude, as a matter of law, that such facts, standing alone, do not satisfy the "ends of justice" standard. Without federal statutory authorization for nationwide service, we need not proceed to the Fifth-amendment inquiry.

B. The Kansas Long-Arm Statute

In the absence of federal authorization for nationwide service, the district court turned to state law. *See* Fed. R. Civ. P. 4(k)(listing, as an alternative to nationwide service under a federal statute, service under a state's long-arm statute). The court first presumed that the

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[4] Cory does not claim a financial impediment to suit in Pennsylvania.

Kansas long-arm statute, Kan. Stat. Ann. § 60-308(b), authorized service, and then proceeded directly to the due-process inquiry. We do the same.

Because "sovereignty defines the scope of the due process test," *Busch v. Buchman, Buchman & O'Brien, Law Firm*, 11 F.3d 1255, 1258 (5th Cir. 1994), the Fourteenth Amendment governs application of a state's long-arm statute. *Ten Mile Indus. Park v. W. Plains Serv. Corp.*, 810 F. 2d 1518, 1524 (10th Cir. 1987). The Fourteenth Amendment's "Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations." *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F. 3d 1086, 1090 (10th Cir. 1998) (quotations omitted). Thus, a nonresident defendant is subject to a court's personal jurisdiction only if there are "minimum contacts between the defendant and the forum state." *Id.* (quotations omitted). This standard is satisfied if the nonresident defendant has "purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." *Id.* at 1090-91 (quotations omitted). Otherwise, the nonresident defendant must have "continuous and systematic general business contacts" with the forum state. *Id.* at 1091 (quotations omitted).

The district court first observed that, instead of offering any evidence or argument concerning SFC's direct contacts with Kansas, Cory claimed that Midwest Steel Span acted as SFC's agent in Kansas. The district court rejected that claim for lack of evidence, stating that Cory failed to show that SFC had any ownership interest in Midwest Steel or any control over Midwest Steel's business affairs. On appeal, Cory makes no agency argument. Consequently, our consideration of the matter ends. *See* Fed. R. App. P. 28(a)(9)(A)(stating that an appellant's argument must contain "contentions and the reasons for them, with

citations to the authorities and parts of the record on which the appellant relies").

Regarding the Davises' and the Bonacci's contacts with Kansas, the district court observed that Cory only offered evidence that Bonacci had responded to an inquiry from the Kansas Attorney General about Cory's claims. The district court ruled that this limited contact was insufficient to confer jurisdiction. On appeal, Cory does not argue otherwise, and we do not consider the matter further. *See id.*

We conclude that the district court did not err in dismissing SFC, the Davises, and Bonacci for lack of personal jurisdiction.

II. Statutes of Limitations

We review de novo the district court's grant of summary judgment to ASB and USBC on statute-of-limitations grounds. *Tiberi v. Cigna Corp.*, 89 F.3d 1423, 1428 (10th Cir. 1996). Summary judgment on such grounds is warranted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R. Civ. P. 56 (c).

A. RICO

The statute of limitations for a RICO action is four years. *Rotella v. Wood*, 528 U.S. 549, 552 (2000). While the Supreme Court has not settled upon a definite rule for when the limitations clock starts running, it has announced two possibilities: either when the plaintiff knew or should have known of his injury (the injury-discovery rule); or when the plaintiff was injured, whether he was aware of the injury or

not (the injury-occurrence rule). *Id.* at 553 & 554 n.2.[5] We need not choose between these rules today because the result is the same no matter which rule is applied.

The crux of Cory's RICO claims is that the defendants sold "defective buildings to take his money." Aplt. Br. at 16. Cory testified at disposition that he "realized [he] had a problem when two buildings had blown down." 1 ROA, Doc. #81, Ex. A (Dep. at 124). Consequently, Cory was injured in 1993, 1995 and 1996 when he purchased the building materials and replacement parts, *see Sedima, S.P.R.L. v. Imrex. Co.*, 473 U.S. 479, 495 (1985) (stating that a civil RICO "injury" means "harm from the predicate acts" that constitute racketeering), and he was aware of his injury no later than June 1999, when the second building collapsed. Yet he failed to initiate litigation within four years of any of these dates. Therefore, all of the RICO claims were untimely under either the injury-discovery or injury-occurrence rules.

The district court determined, however, that Cory had timely asserted a RICO claim as to the building that collapsed in 2001. This determination evinces a misunderstanding of the nature of this case. Cory's injury was complete when he purchased the allegedly defective buildings and parts. The defendants' purported racketeering activities caused that injury and the wind revealed it by collapsing the buildings.

B. The State-Law Claims

In Kansas, there is a three-year statute-of-limitations

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[5] In *Rotella*, 528 U.S. at 554, the Supreme Court rejected the "injury and pattern discovery rule," which this court had adopted in *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F. 2d 817, 820 (10th Cir. 1990) holding that "a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern" quotation omitted)).

period for consumer protection claims, *Roy v. Young*, 93 P.3d 712, 715 (Kan. 2004) (citing Kan. Stat. Ann. § 60-512(2)), and a two-year period for product liability claims, *Fennesy v. LBI Mgmt., Inc.*, 847 P.2d 1350, 1355 (Kan. Ct. App. 1993) (citing Kan. Stat. Ann. § 60-513). The limitations periods for both claims generally begin running when the plaintiff discovers his injury, *see Roy*, 93 P.3d at 715; Kan. Stat. Ann. § 60-513(b).

The district court ruled that Cory's state-law claims were untimely because they had accrued by June 2001 and Cory sued in August 2003. But under this analysis, Cory's consumer-protection claim would have been timely, as it was brought within three years of accrual. Nevertheless, as we concluded above, Cory discovered his injury by June 1999, which is more than four years before he filed suit. Accordingly, both of Cory's state law claims are time-barred.

CONCLUSION

Following the Second, Seventh, and Ninth Circuits, we conclude that § 1965 (b) gives RICO its nationwide jurisdictional reach. But we disagree with the Ninth Circuit and the district court's construction of the "ends of justice" standard, which must be met in order to effectuate nationwide service. Nevertheless, because the standard is not met under the facts of this case, and because there is no state statutory conferral of personal jurisdiction, we affirm the district court's order dismissing SFC, the Davises, and Bonacci. We also affirm the district court's order granting summary judgment to ASB and USBC. But we do so entirely on the basis of the statutes of limitations.[6]

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[6] We grant Cory's motion to file a late reply brief, and we direct the Clerk of the Court to file the brief. We deny Defendants-Appellees' request for costs and attorney fees under Fed. R. App. P. 38.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BILL J.CORY, Plaintiff-Appellant, v. AZTEC STEEL BUILDING INC.; UNIVERSAL STEEL BUILDINGS CORPORATION a PA corporation; GARY J. BONACCI; SHAWN DAVIS; ARNOLD DAVIS; STEEL FACTORY CORPORATION; Defendants-Appellees.		No. 06-3051

ORDER

Filed December 1, 2006

Before **O'BRIEN**, **PORFILIO**, and **ANDERSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk
by:
s/Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BILL J. CORY,

Plaintiff,

Vs. Case No. 03-4193-RDR

AZTEC STEEL BUILDING, INC., et al.,

Defendants.

MEMORANDUM AND ORDER

This is an action for damages arising from the purchase of military Quonset storage units by plaintiff. Plaintiff contends that the units were defective because they were severely damaged by wind. He asserts claims under the Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C. § 1961 et seq., and state law claims under the Kansas Consumer Protection Acts (KCPA), K.S.A. 50-623 et seq., and strict liability in tort. The remaining defendants are: Aztec Steel Building, Inc. (Aztec Steel); and Universal Steel Buildings Corporation (Universal Steel).[1] This matter is presently before the court upon defendants' motion for summary judgment.[2]

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[1] The court has previously dismissed the following defendants for lack of personal jurisdiction: Steel Factory Corporation, Gary Bonacci, Arnold Davis and Shawn Davis.

[2] The court has heard oral argument on this motion. The court wants to briefly comment on the argument because of its unusual nature. At the outset, Mr. Cory, who is not an attorney, asked if he could present the plaintiff's argument.

I.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The requirement of a genuine issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248 (1986). Essentially, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 251-52.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be met by showing that there is a lack of evidence to support the nonmoving party's case. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial. See *Anderson*, 477U.S. at 256. A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of [its] pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Id.* Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary

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Mr. Cory explained that he wished to present the argument because he had filed RICO claims for over 25 years and his attorney was asserting his first such claim. The court agreed to the request. Mr. Cory then proceeded to spend only brief moments discussing the issues raised by the defendants in their summary judgment motion. He then proceeded to argue and explain why the court had erred in its earlier decision on personal jurisdiction. To the extent that Mr. Cory was seeking reconsideration of that order, the court finds Mr. Cory's arguments untimely and without merit.

judgment. *See Id.* The court must consider the record in the light most favorable to the nonmoving party. *See Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985). The court notes that summary judgment is not a "disfavored procedural shortcut;" rather it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." Celotex, 477 U.S. at 327 (quoting Fed.R.Civ. P.1).

II.

The court has carefully reviewed the record in this case to determine what facts are undisputed and what facts are controverted. The court notes that plaintiff has failed to properly comply with D.Kan.Rule 56.1 in responding to defendants' motion for summary judgment. He failed to specifically controvert the facts set forth by the defendants and to refer with particularity to the portions of the record upon which he relied. The court believes the record discloses that the following facts are uncontroverted: Plaintiff is a farmer in Republic County, Kansas. He raises hay and grain. Plaintiff contacted Midwest Steel Span (Midwest Steel) in 1993 about the possible purchase of "Military Quonset" buildings. He intended to use the buildings for hay storage. Midwest Steel was a Kansas company located in Overland Park, Kansas. Plaintiff spoke with Bill Hermanns and then with Lou Havrilla, both employees of Midwest Steel.

On March 30, 1993 plaintiff signed a purchase order with Midwest Steel to purchase five of these Quonset buildings. Midwest Steel then sold the purchase order to Universal Steel, a Missouri corporation. Universal Steel then placed the purchase order with Steel Factory. The materials for these buildings were shipped from Pennsylvania to plaintiff's farm. The purchase order required plaintiff to make payment to the dealer prior to receipt of the buildings. When the materials were delivered, plaintiff issued a check for the remaining balance to

Midwest Steel. In 1995, one of the buildings allegedly sustained damage caused by wind. Plaintiff contacted Midwest Steel to purchase 16 metal arches to replace the damaged arches. Plaintiff also contacted Universal Steel in 1995 to purchase nine additional arches directly from them. Other buildings allegedly sustained damages in June 1999 and June 2001. Plaintiff contacted the defendants in November 2001 concerning the damage. This action was filed in state court on August 26, 2003. It was removed to this court on October 20, 2003.

III.

The amended complaint contains six counts. The first four counts are RICO claims. Count V is a claim under the KCPA, and Count VI is a strict liability in tort claim. Count I alleges a violation of 18 U.S.C. § 1962(c) against all defendants. Count II asserts a violation of 18 U.S.C. § 1962 (a) against all defendants. Count III asserts a violation of 18 U.S.C § 1962 (b) against defendants Arnold Davis and Shawn Davis.[3] Count IV asserts a violation of 18 U.S.C. § 1962(d) against all defendants.

In the motion for summary judgment, defendants raise several issues. First, they contend that plaintiff's claims are barred by the applicable statutes of limitations. Second, they contend they are entitled to summary judgment on plaintiffs RICO claims under Counts I, II and IV because there is no evidence of conduct of an enterprise through a pattern of racketeering activity. Concerning this argument, they assert plaintiff has failed to (1) provide evidence of the conduct of an enterprise; (2) prove a pattern of racketeering activity through predicate acts; (3) show that Midwest Steel was an agent of defendants for RICO purposes; and (4) show that the predicate acts are related. Third, the defendants contend they are entitled to summary

[3] These defendants have been dismissed, so this count is moot.

judgment on plaintiff's claims under the KCPA because plaintiff has not established that they made the necessary representations to establish a claim under the KCPA. Fourth, they assert plaintiff's products liability claim is precluded by the economic loss doctrine. Finally, they argue they are entitled to summary judgment on plaintiff's warranty claims because plaintiff has failed to produce evidence sufficient to support these claims.

IV.

A. STATUTES OF LIMITATIONS

This is a critical issue concerning all of the claims asserted by the plaintiff. The court shall begin with a discussion of the RICO claims and then proceed to the issues concerning the statutes of limitations on the other claims.

1. *RICO claims*

A civil RICO action has a four-year limitation period. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). Both parties have suggested, relying upon *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817 (10th Cir. 1990), the statute of limitations for RICO claims accrues in the Tenth Circuit when the plaintiff discovers, or should have discovered, both his injury and the defendant's pattern of racketeering. However; in *Rotella v. Wood*, 528 U.S. 549, 554 (2000), the Supreme Court abrogated this aspect of *Bath* and ruled the accrual of a RICO claim is not delayed until the plaintiff has discovered the defendant's pattern of racketeering, 528 U.S. at 554-55.

In *Rotella*, the Supreme Court did not decide whether an "injury discovery" or straight injury occurrence" rule should be applied in RICO cases for accrual purposes. *Id.* at 554 n. 2. Most courts, however, both before and after *Rotella*, have adopted the "injury discovery" rule. *See Forbes v. Eagleson*, 228 F.3d 471, 484 (3rd Cir. 2000); *Grimmett v. Brown*, 75 F. 3d 506, 511 (9th Cir. 1996); *McCool v. Strata Oil Co.*, 972 f. 2d 1452, 1464-65 (7th Cir.

1992); *Rodriguez v. Banco Central*, 917 F.2d 664, 665 (1st Cir. 1990); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987). Under the injury discovery rule, a RICO claim accrues when the plaintiff knew or should have known of his injury. We believe this is the appropriate accrual rule to apply, even though the Tenth Circuit has not issued an opinion on this matter since *Bath*, which was ten years prior to *Rotella*.

With that standard in mind, we must consider when plaintiff's RICO claims accrued. The defendants have suggested that plaintiff learned of his injury either in June 1995, when the first building sustained damage, or in June 1999, when the second building suffered damage. The defendants point to plaintiff's deposition where he stated that he knew he had a problem with his buildings in June 1999. Under either accrual date, the defendants argue that plaintiff's RICO claims are time barred because this case was not filed until August 2003.

Plaintiff's response is somewhat puzzling. He suggests initially that he could not have discovered the fraud until June 2001, when another of his buildings suffered damages. He also asserts that the statute of limitations should be tolled from December 2001 through March 2003 based upon equitable estoppel. He contends that the defendants engaged in fraud during that period, and thus the statute of limitations should be tolled.

The court shall recount some additional facts that provide the basis for plaintiff's equitable tolling argument. After the first two buildings were damaged, plaintiff did not contact any of the defendants with a complaint or a request for any action on the alleged warranty. In November or December 2001, plaintiff complained to the defendants about the damage to his buildings for the first time. Some efforts were made to resolve the matter, but no progress was made. On August 2, 2002 plaintiff filed a complaint with the consumer protection division of the attorney general's office. The defendants then retained an expert to examine

the failed buildings. He determined that plaintiff had not properly installed the buildings. This report was submitted to the attorney general's office. Plaintiff contends that this report was false and misleading. The defendants then sent the engineer who designed the buildings to investigate them. He concluded that the buildings were improperly installed because there was no concrete slab floor. This report was also sent to the attorney general's office. The attorney general subsequently dismissed the case on March 12, 2003.

Based upon these facts, plaintiff suggests that equitable tolling should be applied. The court is not persuaded that this doctrine applied because defendants did nothing to conceal the injury in this case, which is what triggers the running of the statute of limitations. The defendants did not appear to do anything to prevent the plaintiff from filing suit. The defendants participated in the attorney general process and sent experts to determine the cause of the failure of the buildings. The court finds no basis in the record to support plaintiff's suggestion that the actions of the defendants constituted fraud.

In any event, there is one other rule that needs to be considered. Neither party has considered the application of this rule. In *Bath*, the Tenth Circuit also adopted the "separate accrual" rule. The "separate accrual" rule is a subset of the "injury discovery" rule. When a pattern of RICO activity causes a continuing series of separate injuries, the "separate accrual" rule allows a civil RICO claim to accrue for each injury when the plaintiff discovers, or should have discovered, that injury. The "separate accrual" rule has been adopted in most of the circuits. *Love v. National Medical Enterprises*, 230 F. 3d 765, 774-75 (5th Cir. 2000); *McCool*, 972 F.2d at 1465-66; *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989).

Absent the application of the separate accrual rule (which plaintiff has not argued and defendants have not considered), the court believes that plaintiff's RICO claims

are time-barred. Under the injury discovery rule, it is clear that plaintiff should have discovered his injuries in June 1999 when the second building was damaged. Plaintiff's suggestion that the statute of limitations does not accrue until June 2001 appears without merit. It is readily apparent that it began to run in June 1999. Accordingly, his complaint is untimely for any claims arising prior to August 1999.

This leads us to the injury he suffered in June 2001. This injury occurred within the four-year statute of limitations. The court believes that plaintiff may assert a claim for this injury. The arguments of the parties are not particularly helpful because neither has found the applicable law. The separate accrual rule would seem to allow this claim, but the claim could only be for the damage to the third building. The other claims remain untimely. Accordingly, at this time, we cannot grant summary judgment to the defendants on all of plaintiff's RICO claims. The court finds plaintiff's RICO claims based upon damages suffered in June 2001 are not time-barred, at lest based upon the arguments that have been made by the parties.

2. *State law claims*

The defendants also contend that plaintiff's state law claims are time-barred. Plaintiff failed to respond to these arguments in his responsive brief or in his oral argument to the court.

The KCPA has a statute of limitations of three years. *Alexander v. Certified Master Builders Corp.*, 268 Kan. 812, 1 P.3d 899 (2000) (holding that actions under the KCPA seeking damages and civil penalties are subject to the three-year statute of limitations found in K.S.A. 60-512(2)). Generally, the limitations period for a KCPA claim is triggered when "the plaintiff discovers (or reasonably should have discovered) the alleged fraud." *Kelly v. Primeline Advisory, Inc.* 256 Kan. 978, 988, 889 P.2d 130 (1995). The alleged fraud is considered "discovered" when

"the act giving rise to the cause of action causes substantial injury, or, if the fact of injury is not reasonably ascertainable until sometime after the initial act, then ...[when] the fact of injury becomes reasonably ascertainable to the injured party." *Schrag v. Dinges*, 788 F.Supp. 1543, 1549 (D.Kan. 1992) (citing K.S.A. 60-513(b)). Or, as the Kansas Supreme Court has a stated, the discovery of fraud is simultaneous with the discovery of the injury resulting from the fraud. *Jennings v. Jennings*, 211 Kan. 515, 527, 507 P.2d 241 (1973). Accordingly, a plaintiff is considered to have discovered the fraud when he or she knew, or with reasonable diligence, should have known of the acts or conduct giving rise to the injury. *Wolf v. Brungardt*, 215 Kan. 272, 524 P.2d 726 (1974).

A claim under the Kansas Product Liability Act (KPLA), K.S.A. 60-3301 *et seq.*, has a two-year statute of limitations. *Fennesy v. LBI Management*, Inc., 18 Kan.App. 2d 61, 847 P.2d 1350 (1993) (KPLA claim subject to the two-year statute of limitations found in K.S.A. 60-513).

Based upon the aforementioned facts, the court finds that plaintiff's claims under the KCPA and the KPLA are barred by the statute of limitations. Under either of the statutes of limitations applicable under the KCPA or the KPLA, these claims are time-barred. All of plaintiff's claims had accrued by June 2001, and this action was not filed until August 2003. With this decision, the court need not consider the other arguments made by the defendants concerning plaintiff's claims under the KCPA or the KPLA.

B. SUBSTANTIVE RICO CLAIMS

Plaintiff has asserted claims under 18 U.S.C. §§ 1962(a), (b), (c), and (d). RICO renders criminally and civilly liable "any person" who uses or invests income derived "from a pattern of racketeering activity" to acquire an interest in or to operate an enterprise engaged in interstate commerce, § 1962(a); who acquires or maintains an interest in or control of such an enterprise "through a

pattern of racketeering activity," § 1962(b); who, being employed by or associated with such an enterprise, conducts or participates in the conduct of its affairs "though a pattern of racketeering activity," § 1962(c); or, finally, who conspires to violate the first three subsections of § 1962, § 1962(d). RICO provides for drastic remedies: conviction for a violation of RICO carries severe criminal penalties and forfeiture of illegal proceeds, 18 U.S.C. § 1963; and a person found in a private civil action to have violated RICO is liable for treble damages, costs, and attorney's fees, 18 U.S.C. § 1964(c).

In order to prove a RICO claim, plaintiffs must show (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. In order to establish a federal civil RICO violation under § 1962(c), the plaintiffs "must satisfy four elements of proof: '(1) conduct (2) or an enterprise (3) through a pattern (4) of racketeering activity.'" *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

With regard to elements (1) and (2) of the four-part test, the plaintiff must establish "conduct of an enterprise" and that the enterprise had a common goal. *See United States v. Turkette*, 452 U.S. 576, 583 (1981) ("The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."). Furthermore, the defendant "must participate in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993).

An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). As stated in *United States v. Goldin Indus.*, Inc., 219 F.3d 1271, 1275 (11th Cir. 2000), "the existence of an enterprise is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." (internal quotation marks and citation omitted).

Furthermore, "the definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes, that is, the pattern of racketeering activity requisite to the RICO violation." *Id.*

Pattern of racketeering activity, as defined in 18 U.S.C. § 1961(5), requires at least two acts of racketeering activity. However, while Congress envisioned circumstances in which no more than two predicates would be necessary to establish a pattern of racketeering activity, the statute implies that while two acts are necessary, they may not be sufficient. *H.J. Inc. v. Northwestern Telephone Co.*, 492 U.S. 229, 237 (1989). What a plaintiff must prove is continuity of racketeering activity. *Id.* at 241. To establish continuity, the plaintiff must demonstrate either a closed period of repeated conduct or past conduct that by its nature projects into the future with a threat of repetition. Closed-ended continuity requires a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct are insufficient. Open-ended continuity requires a clear threat of future criminal conduct related to past criminal conduct. *Id.* at 241-42; *Sil-Flo. Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1516 (10th Cir. 1990).

The defendants have argued that plaintiff has failed to demonstrate (1) conduct of an enterprise; (2) a pattern of racketeering activity, or (3) a relationship of predicate acts.

Having carefully reviewed the arguments of the parties, the court is persuaded that defendants are entitled to summary judgment on plaintiff's RICO claims based upon their contention that plaintiff has failed to show a pattern of racketeering activity. The fraud asserted here shows a transaction between the defendants and the plaintiff. The actual acts of fraud, even as alleged by plaintiff, extend only over a few months. Moreover, there does not appear to be a clear threat of future criminal conduct. Plaintiff has failed to

point to any other customer of the defendants who received defective buildings. It is well-settled in the Tenth Circuit that a single scheme to accomplish one discrete goal, directed at a finite group of individuals, with no potential to extend to other persons or entities, rarely will suffice to establish a threat or continuing racketeering activity. *See Boone V. Carlsbad Bancorporation, Inc.*, 972 F. 2d 1545,1556 (10th Cir. 1992); *Sil-Flo, Inc.*, 917 F.2d at 1516; *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1273-74 (10th Cir. 1989). Having found that plaintiff has failed to establish a pattern of racketeering activity, the court must grant summary judgment to the defendants on plaintiff's RICO claims.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment (Doc. #80) be hereby granted. Judgment is hereby granted to the defendants and against the plaintiff.

IT IS SO ORDERED.

Dated this 18th day of November, 2005 at Topeka, Kansas.

s/Richard D. Rogers
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BILL J. CORY,

Plaintiff,

Vs. Case No. 03-4193-RDR

AZTEC STEEL BUILDING, INC., et al.,

Defendants.

MEMORANDUM AND ORDER

This is an action for damages arising from the purchase of military Quonset storage units by plaintiff. Plaintiff contends that the units were defective because they were severely damaged by wind. He asserts claims under the Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C. 1961 et seq., and state law claims under the Kansas Consumer Protection Acts, K.S.A. 50-623 et seq., and strict liability in tort. The defendants are: Aztec Steel Building, Inc. (Aztec Steel); Steel Factory Corporation (Steel Factory); Universal Steel Buildings Corporation (Universal Steel); Arnold Davis; Shawn Davis; and Gary J. Bonacci. This matter is presently before the court upon the motion of defendants Steel Factory, Gary Bonacci, Arnold Davis and Shawn Davis to dismiss for lack of personal jurisdiction. Steel Factory is a Pennsylvania corporation, and all of the individual defendants are citizens of Pennsylvania except for Shawn Davis, who is a Florida resident.

Defendants Steel Factory and the individual defendants filed the instant motion on June 1, 2004. On December 21, 2004, we issued an order requesting more briefing from the parties. The court noted the parties had

overlooked the fact that plaintiff had invoked federal jurisdiction under RICO in this case. The court requested the parties address the nationwide service of process provisions of RICO. The parties have now responded and the court is prepared to rule. [1]

I.

As we pointed out in the prior order, many of the facts in this case are not in dispute. Plaintiff is a farmer in Republic County, Kansas. He raises hay and grain. Plaintiff contacted Midwest Steel Span (Midwest Steel) in 1993 about the possible purchase of "Military Quonset" buildings. He intended to use the buildings for hay storage. Midwest Steel was a Kansas corporation located in Overland Park, Kansas. Plaintiff spoke with Bill Hermanns and then with Lou Havrilla, both employees of Midwest Steel.

On March 30, 1993, plaintiff signed a purchase order with Midwest Steel to purchase five of these Quonset buildings. Midwest Steel then sold the purchase order to Universal Steel, a Missouri corporation. Universal Steel then placed the purchase order with Steel Factory. The materials for these buildings were shipped from Pennsylvania to plaintiff's farm. The purchase order required plaintiff to make payment to the dealer prior to receipt of the buildings. When the materials were delivered,

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[1] As noted above, the original motion to dismiss was filed by defendants Steel Factory, Bonacci, Arnold Davis and Shawn Davis. In the recent memoranda, the defendants contend that all defendants, including Aztec Steel and Universal Steel, are entitled to dismissal based upon lack of personal jurisdiction. Given the fact that these defendants have never been added to the original motion, the court is reluctant to address the arguments raised by them. The court understands that all of the defendants are represented by the same counsel, but we also note that the original motion clearly listed only four defendants. Given these circumstances, the court shall not consider the arguments of the other defendants concerning person jurisdiction.

plaintiff issued a check for the remaining balance to Midwest Steel. In 1995, one of the buildings allegedly sustained damage caused by wind. Plaintiff contacted Midwest Steel to purchase 16 metal arches to replace the damaged arches. Plaintiff also contacted Universal Steel in 1995 to purchase nine additional arches directly from them. Other buildings allegedly sustained damages in June 1999 and June 2001. Plaintiff contacted the defendants in November 2001 concerning the damage. This action was filed in state court on August 26, 2003. It was removed to this court on October 20, 2003.

II.

The defendants contend the court lacks personal jurisdiction over them. They assert they have had no contacts with the State of Kansas and the exercise of personal jurisdiction over them violates due process. Plaintiff has offered a variety of arguments in support of this position that the defendants are subject to personal jurisdiction in Kansas. [2]

Plaintiff bears the burden of establishing personal jurisdiction over the defendants. *OMI Holdings, Inc. v. Royal Insurance Co. of Canada,* 149 F.3d 1086, 1091 (10th Cir. 1998). Where, as here, the court does not hold an evidentiary hearing, and the motion rests on the plaintiff's complaint and affidavits and other materials submitted by the parties, the plaintiff need only make a prima facie

[2] In his most recent response, plaintiff complained that he has been unable to obtain discovery on some matters related to personal jurisdiction. The court is not persuaded that any delays are the fault of the defendants or the court. On January 13, 2005, the magistrate judge granted plaintiff's motion to compel. The defendants were directed to produce the requested discovery within twenty days of the date of that order. This time period has since passed and plaintiff has made no effort to supplement his response with any materials. Accordingly, the court shall proceed to consider the instant motion based upon the materials that have been presented.

showing of personal jurisdiction. *Id.* "The plaintiff may make this prima facie showing by demonstrating, via affidavit or other written materials, facts that if true would support jurisdiction over the defendant. In order to defeat a plaintiff's prima facie showing of jurisdiction, a defendant must present a compelling case demonstrating 'that the presence of some other considerations would render jurisdiction unreasonable.'" *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

"Before a federal court can assert personal jurisdiction over a defendant in a federal question case, the court must determine (1) 'whether the applicable statute potentially confers jurisdiction by authorizing service of process on the defendants, and (2) 'whether the exercise of jurisdiction comports with due process.'" *Peay v. Bellsouth Medical Assistance Plan*, 205 F. 3d 1206 1209 (10th Cir. 2000) (quoting *Republic of Panama v. BCCI Holdings* (Luxembourg) S.A., 119 F.3d 935, 942 (11th Cir. 1997)).

The venue, jurisdiction, and service-of-process provisions of RICO are contained in § 1965, as follows:

> (a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.
>
> (b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.
>
> . . . . .
>
> (d) All other process in any action or proceeding under this chapter may be served on any person in

any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

This court has previously held, relying upon 18 U.S.C. § 1965 (d), that RICO authorized nationwide service of process. *Merchants National Bank v. Safrabank*, 1991 WL 173781 at *1 (D.Kan. 1991). With this determination, the court went on to determine when a federal statute provides for nationwide service of process there is no requirement of minimum contacts with the state in which the federal court sits. *Id.* Rather, a plaintiff need only demonstrate that a defendant has minimum contacts with the United States. *Id.* at *2.

Since our decision in *Safrabank*, many courts have considered whether RICO authorizes nationwide service of process. Recently, in *Multi-Media International, Inc. v. Promag Retail Services, LLC*, 343 F. Supp. 2d 1024 (D.Kan. 2004), Judge Van Bebber considered this issue in a thoughtful and well-reasoned opinion. Judge Van Bebber had also concluded in a prior opinion, *Headwear, U.S.A., Inc. v. Stange*, 166 F.R.D. 36, 38 (D. Kan. 1996), that 1965 (d) authorized nationwide service of process. After careful analysis of the issue again, he concluded, contrary to his opinion in *Headwear* and our opinion in *Safrabank*, that 18 U.S.C. § 1965(d) did not authorize nationwide service of process. He did, however, determine that 18 U.S.C. § 1965(b) did provide for nationwide service of process, but only in limited circumstances. He stated:

> After reviewing the relevant case law, the court concludes that it must overrule its prior position in Headwear that construed § 1965(d) as RICO's nationwide service of process provision. The court is persuaded by the decisions in the Second and Ninth Circuit

> identifying § 1965(b) as RICO's national service of process provision and limiting its applicability to situations where: (1) a court possesses personal jurisdiction over at least one defendant; and (2) the "ends of justice" require a plaintiff to bring all the defendants before that court because no other district court possesses personal jurisdiction over all the defendants.

Multi-Media International, 343 F. Supp. At 1030 (footnote omitted).

After carefully reviewing and considering Judge Van Bebber's opinion, we believe that he has correctly determined these issues. See also Dickerson, Curtailing Civil RICO's Long Reach: Establishing New Boundaries for Venue and Personal Jurisdiction under 18 U.S.C. § 1965, 75 Neb.L.Rev. 476 (1996). We shall follow his opinion and overrule our decision in *Safrabank*.

With the application of the ruling in Multi-Media International, we must find that § 1965(b) is inapplicable here. The "ends of justice" requirement is not satisfied because defendants are all subject to suit in Pennsylvania. [3] Since RICO does not authorize nationwide service of process, the court must determine whether the Kansas long-arm statute potentially confers personal jurisdiction by authorizing service of process, and then evaluate

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[3] The defendants have acknowledged and plaintiff has not disputed that all of the defendants are subject to suit in Pennsylvania. The corporate defendants are Pennsylvania corporations. Defendants Bonacci and Arnold Davis are residents of Pennsylvania. Defendant Shawn Davis is a resident of Florida, but he concedes that he is subject to suit in Pennsylvania as a corporate officer of Steel Factory and Aztec Steel.

whether the exercise of jurisdiction satisfies due process. *Multi-Media International*, 343 F. Supp.2d at 1031.

In *Multi-Media International*, Judge Van Bebber correctly set forth standards that must be applied here as follows:

> In Kansas, analyzing a motion to dismiss for lack of personal jurisdiction involves an inquiry as to: (1) whether the court has personal jurisdiction under the Kansas long-arm statute, K.S.A. § 60-308 (b); and (2) whether the exercise of such jurisdiction comports with due process. *Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Coop.*, 17 F.3d 1302, 1304 (10th Cir. 1994). However, "these inquiries are for all intents and purposes the same because the Kansas long-arm statute...has been liberally construed by the Kansas courts to assert personal jurisdiction to the full extent permitted by the due process clause." *Flannagan v. Bauer*, 905 F.Supp. 933, 936 (D. Kan. 1995) (citing *Thompson v. Chambers*, 804 F. Supp. 188, 195 (D.Kan. 1992)). The court, therefore, proceeds directly to the constitutional issue. *Federated Rural Elec. Ins. Corp.*, 17 F.3d at 1304. *Id.*

The parties have agreed that subject matter jurisdiction here is based upon diversity jurisdiction. [4] The

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[4] There is no doubt that subject matter jurisdiction is present pursuant to 28 U.S.C. § 1332 because the parties are diverse. However, jurisdiction could also be based upon 28 U.S.C. . § 1331 because of the presence of the RICO claim. For the purposes of personal jurisdiction, the court does not believe that the basis of subject matter jurisdiction is material because the standards to be applied are the same. See Multi-Media International, 343 F. Supp. 2d at 1031 ("minimum contacts" inquiry under the Fourteenth Amendment is applied to both federal question and diversity cases.

touchstone of the constitutional inquiry under the due process clause of the Fourteenth Amendment is whether the nonresident party purposefully established "minimum contacts" with the forum state. *See Burger King*, 471 U.S. at 474. The "minimum contacts" standard may be established by either specific jurisdiction or general jurisdiction. *Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 455-56 (10th Cir. 1996).

For specific jurisdiction to lie, there must be some act by which the nonresident party "purposefully avails itself of the privilege of conducting activities in the forum state." *Burger King*, 471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). That requirement ensures that parties "will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts." *Id.* The contacts with the forum state should be such that the party "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980).

A court may maintain general jurisdiction over a defendant based on the defendant's general business contacts with the state. *OMI Holdings*, 149 F.3d at 1091. General jurisdiction exists when the defendant's contacts with the forum state are so systematic and continuous that the court may exercise jurisdiction over the defendant even though the claims at issue are unrelated to the defendant's contacts with the state. *Id.*

III.

Plaintiff has failed to articulate whether he asserts personal jurisdiction over the defendants based upon specific or general jurisdiction. His arguments straddle both of these concepts. Accordingly, the court shall consider the application of each one to this case.

A. Steel Factory

Plaintiff has provided no evidence or argument that Steel Factory had any direct contacts with the State of Kansas. Plaintiff does not dispute the evidence provided by

Steel Factory that it has no direct contacts with Kansas in the form of employees, offices, bank accounts or other property. Rather, plaintiff's basis for the exercise of jurisdiction over Steel Factory is that it is an agent of Midwest Steel. Steel Factory has admitted that Midwest Steel was a dealer of its products, but it denies that Midwest Steel is its agent. Plaintiff points to the following to support his contention of agency: (1) the language in the contract between Midwest Steel and him; (2) representations made by employees of Midwest Steel to him; and (3) misrepresentations and errors contained in the affidavit of Havrilla.

An agent's contacts with the forum state may be imputed to a nonresident corporation for long-arm jurisdiction. *Kuenzle*, 102 F. 3d at 458-49. In the absence of an agency relationship, the acts of a distributor are not ordinarily attributable to a foreign manufacturer for the purposes of personal jurisdiction. *Id.* at 459. Plaintiff has the burden of demonstrating a prima facie case of agency. *See* Casad, Jurisdiction in Civil Action ¶4-3 [1] (1998 and Supp. 2004).

Agency is defined in Kansas as a contract, either express or implied, by which one party confides to another the management of some business to be transacted in the confiding party's name, or on the confiding party's account, and by which the other assumes to do business and to render an account of it. *Wheat v. Kinslow*, 316 F. Supp. 2d 944, 953-54 (D.Kan. 2003). The burden of establishing agency is on the party asserting it. *Id.* at 954.

The court has conducted a thorough examination of the materials provided by the parties. The court does not find that there is sufficient evidence that Midwest Steel is an agent of Steel Factory. The record before the court shows that Midwest Steel is an independently owned and operated business. There is no evidence that Steel Factory has any ownership interest in Midwest Steel. Moreover, there has been no showing that Steel Factory has any control over the

business affairs of Midwest Steel. In fact, plaintiff has failed to show that Steel Factory even conducted business with Midwest Steel. Rather, the materials before the court show that Midwest steel sold its purchase order with plaintiff to Universal Steel Buildings of Kansas City, Missouri, who then placed the order with Steel Factory. Plaintiff has presented nothing to counter the aforementioned evidence. He has pointed to some language in the contract he entered into with Midwest Steel, but none of those provisions provide any support for his contention that Midwest Steel was an agent of Steel Factory.

Without showing of agency, plaintiff must demonstrate that Steel Factory has sufficient minimum contacts with the State of Kansas. Plaintiff has not done so. Plaintiff has failed to show that specific or general jurisdiction exists over Steel Factory in Kansas. Steel Factory does not transact any business in Kansas. As noted previously, Steel Factory has no direct contacts with Kansas in the form of employees, offices, bank accounts, or other property. Steel Factory has no registered agent in Kansas and does not pay taxes in Kansas. There has been no showing that Steel Factory advertises in Kansas. Plaintiff has pointed to a number of advertisements for steel buildings in publications that found their way into Kansas, but none of the advertisements involved Steel Factory.

In sum, the court does not find that personal jurisdiction over Steel Factory exists in Kansas. Accordingly, Steel Factory must be dismissed for lack of personal jurisdiction.

B. Individual Defendants

Plaintiff has not offered any evidence to show that the individual defendants had sufficient contacts with the State of Kansas to exercise personal jurisdiction over them. The only exercise of any contact by any of the individual defendants concerns a response by Gary Bonacci to a request by the Kansas Attorney General to provide some

information on the facts concerning the transaction that provides the basis for this lawsuit. This limited contact is not sufficient to provide the necessary minimum contacts with the State of Kansas.

Given these circumstances, the court must also grant the motion of the individual defendants for dismissal based upon lack of personal jurisdiction.

IT IS THEREFORE ORDERED that defendants' (Steel Factory Corporation, Arnold Davis, Shawn Davis and Gary J. Bonacci) motion to dismiss for lack of personal jurisdiction (Doc. # 41) be hereby granted. These defendants are hereby dismissed for lack of personal jurisdiction.

IT IS SO ORDERED.
Dated this 5th day of April, 2005 at Topeka, Kansas.

s/Richard D. Rogers
United States District Judge

Not Designated for Publication

DIVISION I

ARKANSAS COURT OF APPEALS

No. CA02-440

	Opinion Delivered April 2, 2003
BILL J. CORY	APPEAL FROM THE SEARCY
APPELLANT	COUNTY CIRCUIT COURT [NO. CIV 98-50]
V.	HON. CHARLES E. CLAWSON, JR., JUDGE
TOM KEELING	
APPELLEE	REVERSED AND REMANDED

JOHN MAUZY PITTMAN, Judge

This is a pro se appeal from an order denying registration of a foreign judgment on the grounds that the Arkansas appellee did not have the requisite minimum contacts with the forum state. We agree with appellant's argument that the trial court erred in denying registration of the Kansas judgment he obtained against appellee, and we reverse.

Under the Full Faith and Credit Clause of the United States Constitution, Art. IV, 1, a foreign judgment is as conclusive on collateral attack, except for defenses of fraud in the procurement or want of jurisdiction in the rendering

court, as a domestic judgment would be. *McDermott v. Great Plains Equipment Leasing Corp.*, 40 Ark. App. 8, 839 S.W.2d 547 (1992). These judgments are presumed valid and the burden of proving them invalid is on the party attacking the foreign judgment. *Id.*

The U.S. Supreme Court has established a two-pronged test to determine whether state courts may maintain personal jurisdiction over a nonresident person under the Due Process Clause of the Fourteenth Amendment. The party must first show that the nonresident has had sufficient "minimum contacts" with this state and, second, must show the at the court's exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice." *International Shoe Co., v. Washington*, 326 U.S. 310, 316 (1945). Personal jurisdiction over a nonresident defendant generally exists when the defendant's contacts with the state are continuous, systematic, and substantial. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984)); see also *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). A finding of personal jurisdiction must be based on some act by which the defendant purposefully avails himself or herself of the privilege of conducting business in the forum state, *Hanson v. Denckla*, 357 U.S. 235 (1958), and the contacts should be such as would cause a defendant to have a reasonable anticipation that he or she would be haled into court in that state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

The Kansas long-arm statute, K.S.A. 60-308(b), is typical in that it is to be liberally construed to assert personal jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause of the United States Constitution. *Kluin v. American Suzuki Motor Corp.*, 56 P.3d 829 (Kan. 2002). Once the court determines that the defendant's purposeful acts caused minimum contacts with the state of Kansas, these contacts should be considered in light of other factors, such as the burden on the defendant, the forum's interest, the plaintiff's interest, and the interest

of the interstate judicial system. *Matter of Hesston Corp.*, 870 P.2d 17 (Kan. 1994).

The matters relevant to these factors in the present case may be simply stated. Appellee lives in Arkansas. Appellant has a hay farm in Kansas. The record shows that appellee purchased several loads of hay from appellant. Appellee learned of appellant's hay farm through a directory printed by the Kansas Department of Agriculture. Appellee denied having spoken to appellant in Kansas. He admitted, however, that he entered into an agreement for the purchase of hay produced in Kansas, and that he arranged for J.B. Hunt trucking company to pick up the hay in Kansas and delivery it to appellee in Arkansas. This was repeated on three occasions. However, appellee did not pay for the third load, and appellant therefore refused to load the fourth truck appellee sent. Appellant sued appellee in Kansas and obtained the judgment that he attempted to register in the present case.

We think that the record shows that appellee's repeated purchases of hay he saw advertised in a publication of a governmental agency of the state of Kansas, that was produced, loaded and weighed in the state of Kansas, together with his actions of repeatedly dispatching agents to Kansas to pick up his purchases, demonstrates that he purposely availed himself of the privilege of doing business in that state, and that the trial court erred in finding that his contacts with Kansas were not sufficiently continuous, systematic, and substantial to provide the minimum contact required for personal jurisdiction.

Reversed and remanded.
HART and GLADWIN, JJ., agree.

APPENDIX C

Appendix C

Federal Statutory Provisions Involved

Title 18 U.S.C.

1962. Prohibited activities
In pertinent part:
(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

1964. Civil remedies
In relevant part:
(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee....

1965. Venue and Process
In relevant part:
(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.
(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may

cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States....

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district....

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, as an agent, or transacts his affairs.

State of Kansas Statutory Provision Involved
In pertinent part:
K.S.A. 60-308(b) Submitting to Jurisdiction-Process
"Any person, whether or not a citizen or resident of this state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits the person and, if an individual, the individual's personal representative, to the jurisdiction of the courts of this state so to any cause of action arising from the doing of any of these acts:

(1) transaction of any business within this state;
(2) commission of a tortuous act within this state;...
(7) causing to persons or property within this state any injury arising out of an act or omission outside of this state by the defendants, at the time of the injury either (A) the defendant was engaged in solicitation or service activities within this state; or (B) products, materials or things processed, serviced or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of trade or use"

No. 06-1170

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

BILL J. CORY,

Petitioner,

v.

AZTEC STEEL BUILDINGS *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT TO THE QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Tenth Circuit's Opinion affirming that District Court's rigorous analysis is in accord with the plain congressional intent of the "nationwide service of process" provision in RICO and, therefore, does not implicate an important federal question that needs to be ruled upon by this Court.

II. Whether Petitioner had presented compelling reasons to grant the Petition, where the issue of long arm jurisdiction under the Kansas long arm statute fails to implicate an important federal question that needs to be ruled upon by this Court.

III. Whether Petitioner has presented compelling reasons to grant the Petition, where the accrual of the RICO statute of limitations is based on uniform analysis applied by the federal circuits and does not implicate a federal question that needs to be ruled upon by this Court.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

There are no other parties to the proceeding other than those listed herein.

Respondent Steel Factory Corporation does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

Respondent Universal Steel Corporation does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

Respondent Aztec Steel Buildings does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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BRIEF IN OPPOSITION

SUMMARY OF REASONS TO DENY PETITION

Petitioner has presented no compelling reason why certiorari should be granted in the present action. Petitioner requests certiorari regarding two rulings from the district court which were subsequently affirmed in the Tenth Circuit Court of Appeals. The first ruling dismissed four Respondents from the action for lack of personal jurisdiction. Although Petitioner argued that personal jurisdiction existed under the "nationwide service of process" provision of the Racketeering Influence Corrupt Organization act or, alternatively, the Kansas Long Arm Statute, both lower courts determined the factual findings did not warrant personal jurisdiction over Respondents Steel Factory Corporation, Arnold Davis, Shawn Davis or Gary Bonacci.

The District court then granted summary judgment on statute of limitations grounds as to the remaining Respondents, Universal Steel of Pennsylvania and Aztec Steel Buildings. Under the facts of the case, Petitioner failed to pursue any action against any of the Respondents regarding the alleged defective quonset huts at issue for more than four years after the discovery of the injury. This failure to pursue any remedies within a four year period barred Petitioner's claims under RICO, products liability, and the Kansas Consumer Protection Act.[1]

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[1] The applicable RICO Statute of Limitations is four years, Kansas Consumer Protection Act is three years and products liability is two years. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987); *Alexander v. Certified Master Builders Corp.*, 268 Kan. 812, 1 P. 3d 899 (2000) (holding that actions under the KCPA seeking damages and civil penalties are subject to the three year statute of

(Continued on following page)

The essential holdings of the Tenth Circuit Court of Appeals appealed from are as follows:

1. The nationwide service of process provision in RICO is unavailable to Petitioner since he failed to meet the "ends of justice" as required for the application of RICO's nationwide service of process provision contained in U.S.C.A. § 1965(b).

2. The statute of limitations with respect to any of Petitioner's claims under RICO or state law had expired under the injury discovery rule or the injury occurrence rules articulated by the United States Supreme Court and the Circuit Courts of Appeal.

3. No personal jurisdiction exists under the Kansas long arm statute with respect to the individual respondents and Respondent Steel Factory Corporation since none of those respondents had sufficient contact with the forum state to confer jurisdiction.

While issues one (1) and two (2) implicate federal law, issue three (3) is wholly within the province of the Tenth Circuit Court of Appeals since it applied its expertise in the interpretation of Kansas law. *Unum Life Ins. Co. of America v. Ward*, 526 U.S. 358 (1999); *Stenberg v. Carhart*, 530 U.S. 914 (2000). Consequently, the remaining question for this Court is whether the issues presented in (1) and (2) warrant review in the United States Supreme Court. Respondents posit that review is simply not warranted. Not only were these issues correctly decided, there is no

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limitations found in K.S.A. 60-512(2); K.S.A. 60-3301 *et seq.* (Kansas Products Liability Act)

evidence of an important federal question that needs to be taken up by this Court.

Throughout this litigation and within the Petition for Writ of Certiorari, Petitioner has continually made unfounded allegations of fraud and misrepresentation which were dismissed by the district court and the Tenth Circuit Court of Appeals upon careful examination of the evidence. Instead, this case is a simple garden variety products liability claim which Petitioner has attempted to transform into a RICO claim. Petitioner purchased a product, installed that product and used that product for years without incident. At some point, Petitioner became dissatisfied with the product and contacted the manufacturer. However, when Petitioner filed the lawsuit in 2003, he was out of time to pursue any remedies that may have been available to him.

Moreover, he attempted to assert personal jurisdiction over three individuals and a corporation with no evidence of sufficient contacts with the forum state to support the exercise of personal jurisdiction. In a last-ditch effort to salvage personal jurisdiction, Petitioner argues that the outdated interpretation of RICO's "nationwide service or process" should be applied. While there is technically a split in the circuits regarding this application, courts applying this provision since the landmark case of *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65 (2nd Cir. 1998) have realized the intent of Congress that 18 U.S.C.A. § 1965(b) and not the catch-all provision of § 1965(d) is the nationwide service of process provision. This Court recognized as much in denying certiorari on the identical personal jurisdiction issue in *Centricut, LLC v. ESAB Group, Inc.*, 523 U.S. 1048 (1998) (denying Petition for Certiorari due to Fourth Circuit misconstruction of RICO's "nationwide service of process" provision).

Since there is no important issue or conflict to be resolved with respect to the RICO Nationwide Service of Process Provision, the accrual of the RICO statute of limitations or the Kansas Long Arm Statute, Petitioner's request for certiorari should be denied in its entirety.

STATEMENT OF THE CASE

On April 8, 2004, Petitioner filed an Amended Complaint in the United States District Court for the District of Kansas alleging that the Respondents violated the Organized Crime Control Act of 1970 et al. and the Kansas Consumer Protection Act. Petitioner also alleged violations of K.S.A. 60 § 3303 (Kansas Products Liability Act). Respondents Steel Factory, Gary Bonacci, Arnold Davis and Shawn Davis filed a motion to dismiss for lack of personal jurisdiction as none are Kansas residents nor did any of these Respondents have contact with the State of Kansas regarding the purchase of the five quonset huts in question. This Motion was granted as to these Respondents.

Subsequently, a Motion for Summary Judgment was filed by the remaining Respondents, Universal Steel Buildings and Aztec Steel Buildings arguing that the statute of limitations had run on all claims against these two entities and that based on the uncontroverted facts, Petitioner was not entitled to the relief he requested.

This lawsuit arises out of the collapse of several quonset huts purchased by Petitioner. The underlying facts of this case establish that Petitioner, a farmer in Republic County, Kansas, contacted Midwest Steel Span of Overland Park, Kansas regarding the possible purchase of

several metal quonset buildings for hay storage. Upon contacting Midwest Steel Span (an entity unrelated to any of the corporate Respondents), Petitioner alleges he was informed that there were five "military" style quonset huts available for purchase as a government contract had fallen through. After negotiating with Midwest Steel Span, Petitioner entered into a contract with Midwest Steel Span for the purchase of the quonset huts. According to the terms of the contract, Petitioner agreed to purchase the five quonset huts from Midwest Steel Span of Overland Park, Kansas on March 30, 1993. Pursuant to his contract with Midwest Steel Span, Petitioner received the component parts for the metal quonset buildings and hired a contractor to oversee the process of pouring and setting of the foundations.

The five (5) initial buildings purchased were completed in 1993 and performed without issue until June of 1995 when the first building allegedly sustained damage caused by wind. At no time in 1995 did Petitioner contact any of the defendants to complain about the buildings or to institute a warranty claim. The only action taken by Petitioner after this initial failure, was to place an order with Midwest Steel Span for six replacement arches in 1996. The second metal quonset building allegedly sustained damage in June of 1999. It was at this time Petitioner admits "he knew he had a problem" with the buildings. However, once again, Petitioner made no effort to contact the manufacturer or make a claim under the "warranties" he alleges were in place. Petitioner did contact Respondent Universal Steel Buildings of Pennsylvania directly in 1996 to order nine (9) replacement arches for the second building. No attempt was ever made to contact

Respondent Steel Factory or complain about the quality of the buildings. The final building collapsed in 2001.

Once Steel Factory was advised of the problems with the quonset buildings in December of 2001, Respondent Steel Factory sent a licensed engineer to conduct an investigation. The licensed engineer retained by Respondent Steel Factory determined that the foundations had not been constructed in accordance with the foundation guidelines issued by the manufacturer.[2] The Kansas Attorney General concluded that there was no violation of the Kansas Consumer Protection Act. Subsequently, in August of 2003, this lawsuit was filed.

The corporate defendants in this matter are all separate Pennsylvania corporations and were not parties to this contract. Instead, the contract was exclusively between Mr. Cory and Midwest Steel Span, an independent dealer that often sold products manufactured by one of the corporate defendants, Steel Factory Corporation. The other defendants in this matter do not manufacture the products in question. Universal Steel Buildings of Pennsylvania is another independent dealer of products manufactured by defendant Steel Factory. In the same vein, Defendant Aztec Steel Buildings, Inc. is an independent shipping company that often delivers parts manufactured by Steel Factory Corporation to those purchasing products from various independent dealers.

Generally, when Steel Factory Corporation receives a purchase order from an independent dealer, it supplies the

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[2] The buildings were shipped as component parts. Petitioner was then responsible for the construction of the buildings in accordance with the specifications.

material ordered pursuant to a dealership agreement. Upon shipment of the material by Steel Factory Corporation, title to the merchandise shifts from Steel Factory to the dealer until such time as delivery and final payment is received by the consumer. In this particular case, Midwest Steel Span entered into an agreement with another independent dealer, Universal Steel Buildings of Kansas City, Missouri, a Missouri corporation. Universal Steel Buildings of Kansas City, Missouri then submitted a separate purchase order to Respondent Steel Factory Corporation of Pennsylvania. This contract listed Midwest Steel Span as the "buyer" and Universal Steel Buildings of Kansas City, Missouri as the seller.[3]

All of the corporate Respondents in the present matter are Pennsylvania corporations and not registered to do business in the State of Kansas. None of these entities has any corporate relationship to Midwest Steel Span of Overland Park, Kansas. In fact, as admitted by Petitioner, none of these entities took part in the negotiations for the purchase of the original five quonset huts in question.

The individual Respondents in this matter are Arnold Davis, Shawn Davis, and Gary Bonacci. Arnold Davis is a resident of Pennsylvania. He is the President of Aztec Steel Buildings, Inc., Steel Factory Corporation and Universal Steel Buildings, Inc. of Pennsylvania. Mr. Arnold Davis does not maintain a residence, personal bank accounts, own any land or pursue any other personal

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[3] As noted by the Tenth Circuit Court of Appeals, Universal Steel of Kansas City Missouri is an independent dealer to whom Midwest Steel Span sold Mr. Cory's purchase order and is wholly unrelated to Respondent Universal Steel of Pennsylvania.

business ventures in Kansas. Respondent Shawn Davis is a resident of Florida and is the Vice President of Aztec Steel Buildings, Inc., Steel Factory Corporation and Universal Steel Buildings, Inc. of Pennsylvania. Mr. Shawn Davis does not maintain a residence, personal bank accounts, own any land or pursue any other personal business ventures in Kansas. Finally, Respondent Gary Bonacci is the Plant Manager of Steel Factory Corporation. Mr. Bonacci does not maintain a residence in Kansas, personal bank accounts, own any land or pursue any other business ventures in Kansas.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 outlines the requirements for review by the United States Supreme Court. As noted in Rule 10:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling or fully measuring the Court's discretion, indicate the character and reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with the decision by a state court of last resort; or has so far departed from the accepted usual course of judicial proceedings or sanctioned such departure by a lower

> court, as to call for an exercise of this Court's supervisory power:
>
> . . . .

Since the decisions in question were rendered by the United States District Court for the District of Kansas and the Tenth Circuit Court of Appeals, subsections (b) and (c) of Rule 10 are inapposite. Consequently, Petitioner must establish that the Tenth Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. In the present action, the fact that there may be a minor conflict between several Circuits on one of Petitioner's issues, does not warrant a granting of Petitioner's Petition for Writ of Certiorari. *See, e.g., Centricut, LLC v. ESAB Group, Inc.*, 523 U.S. 1048 (1998) (denying Petition for Writ of Certiorari to determine construction of RICO's nationwide service or process provision.)

I. RICO NATIONWIDE SERVICE OF PROCESS PROVISION

A. This Court Has Already Determined The Question Presented Regarding The "Nationwide Service Of Process Provision" Does Not Merit Review

In *Centricut, LLC v. ESAB Group, Inc., supra*, the United States Supreme Court denied a certiorari petition requesting review based on a "conflict between the circuits" with respect to the proper interpretation of RICO's nationwide service of process provision. Specifically, the Petitioner, *Centricut, LLC,* requested certiorari based on the Fourth Circuit opinion applying 1965(d) as RICO's nationwide service of process provision.

Although the Tenth Circuit in the present action correctly applied 1965(b) as the "nationwide service of process" provision, it is clear from this Court's denial of a previous request to determine this issue.

B. The Tenth Circuit Court Of Appeals Correctly Analyzed Current Case Law And Applied To The Undisputed Facts In Determining RICO's Nationwide Service Of Process Provision Was Inapplicable Since The "Ends Of Justice" Requirement Had Not Been Met

In the present action, the district court and the Tenth Circuit Court of Appeals carefully and correctly determined the issues presented in the products liability case. First, the district court was faced with a motion to dismiss filed by four of the defendants, a Pennsylvania based company and three individuals employed by or serving as officers with some or all of the defendants. The Tenth Circuit correctly determined that Defendant Steel Factory, a Pennsylvania based manufacturer providing products to independent dealers was not subject to personal jurisdiction under RICO or the Kansas Long Arm Statute. Although Petitioner asserted the RICO "nationwide service of process" provision, the Tenth Circuit determined that the "ends of justice" requirement was not met in this case since the Court had only Mr. Cory's assertion that he had sustained damage in Kansas to consider when determining the propriety of Kansas as a forum. The Tenth Circuit Court of Appeals also agreed with the District Court that state long arm jurisdiction was not present.

RICO's "nationwide service of process" provision was originally considered by the Ninth Circuit in *Butchers Union Local No. 498 v. SDC Inv., Inc.,* 788 F.2d 535, 538

(9th Cir. 1986). Although the Ninth Circuit correctly concluded that 1965(b) contained RICO's "nationwide service of process" provision, it did not address the existence of 1965(d). The Seventh Circuit similarly concluded that 1965(b) authorized nationwide service of process but failed to address subsection (d). Ten years later, the Eleventh Circuit addressed subsection (d) but erroneously concluded that it authorized "nationwide service of process." *See Republic of Panama v. BCCI Holdings (Luxemborg) S.A.*, 119 F.3d 935, 942 (11th Cir. 1997). Subsequently, the Fourth Circuit agreed but failed to address the opposite conclusion of the Seventh and Ninth Circuits. *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 627 (4th Cir. 1997); *See* 18 U.S.C.A. § 1965 in Petitioner's Petition for Writ of Certiorari at page C-1. The statute states, in pertinent part:

> 1965 Venue and Process
>
> (a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.
>
> (b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parities to be summoned, and process for that purpose may be served in any judicial district of the United States . . .
>
> (c) In any civil or criminal action or proceeding instituted by the United States under this

> chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district. . . .
>
> (d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent or transacts his affairs.

The circuits have issued conflicting opinions regarding whether (b) or (d) of § 1965 contains the "nationwide service of process provision." The split in the circuits noted by Petitioner essentially arises because the Fourth and Eleventh Circuits considered the application of RICO's nationwide service of process provision in 1997 and did "not pause long over the . . . question." *See Tenth Circuit Court of Appeal Opinion* at p. B-6 of Petitioners Brief (citing *Republic of Panama v. BCCI Holdings,* 119 F.3d 935, 942 (11th Cir. 1997). Moreover, the decisions of the Second and Seventh Circuits do not provide much analysis regarding their conclusion that the 1965(b) provides for "nationwide service of process."

In *PT United Can Co. v. Crown Cork & Seal Co.,* 138 F.3d 65 (2nd Cir. 1998), the Second Circuit reviewed the decisions of all these circuits and performed a full analysis of the text of 18 U.S.C.A. § 1965. In that analysis, the court conducted a comprehensive sequential reading of the statute concluding that 1965(a) sets venue in "any district in which [a defendant] resides, is found, has an agent, or transacts his affairs." *Id.* This section thereby suggests that "an action can only be brought in a district court where personal jurisdiction based on minimum contacts is established as to one defendant," *Tenth Circuit Court of*

Appeals Opinion at p. B-6 of Petitioner's Brief (citing *PT United Can,* 138 F.3d at 71). The Second Circuit then looked at 1965(b) which "authorizes service of summons on other parties residing beyond the venued district if necessary to further the 'ends of justice.'" *Id.* The *PT United Can* court concluded that the "ends of justice" requirement in this provision expressed Congress' preference that "defendants not be unnecessarily haled into unexpected forums." *Id.* The final provision, 1965(d) referencing "'[a]ll other process' must mean process" different that a summons or government subpoena both of which are dealt with in previous subsections. *Id.* (citing *PT United Can,* 138 F.2d at 72). Based on this analysis, it was clear to the *PT United Can* court that Congress intended § 1965(d) to address situations not covered by the other provisions. Since § 1965 unequivocally addresses personal jurisdiction, the ends of justice requirement contained therein cannot be ignored.

In the present action, the Tenth Circuit carefully reviewed the statute and the analysis in *PT United Can, supra,* in applying § 1965(b) to determine whether the District Court in Kansas had personal jurisdiction over the three individual respondents and Respondent Steel Factory Corporation. Additionally, the court correctly determined that Petitioner had failed to satisfy the "ends of justice requirement" necessary to invoke jurisdiction over these four non-resident Respondents since the only evidence presented was that Petitioner sustained damage in Kansas. The evidence of damage sustained in the forum state, without more, is insufficient to invoke RICO's nationwide service of process provision.

II. KANSAS LONG ARM STATUTE

The Tenth Circuit Court of Appeals next considered whether the Kansas Long Arm Statute conferred personal

jurisdiction over the three individual Respondents and Respondent Steel Factory. Since the construction of the Kansas Long Arm Statute is uniquely within the expertise of the Tenth Circuit, this Court should refuse Certiorari on the issue. *See Stenberg v. Carhart*, 530 U.S. 914 (2000) (noting the Supreme Court "rarely reviews construction of a state law agreed upon by two lower federal courts.") As the Supreme Court has recognized time and again, it "rarely reviews the construction of a state law agreed upon by two lower federal courts." *Stenberg v. Carhart*, 120 S. Ct. 2597 (U.S. 2000); *see also Unum Life Ins. Co. of America v. Ward*, 526 U.S. 358 (1999); *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Pierson v. Ray*, 386 U.S. 547 (1967); and *United States v. Durham Lumbar Co.*, 363 U.S. 522 (1960).

In analyzing the Kansas Long Arm Statute, the Tenth Circuit and the United States District Court for the District of Kansas recognized that none of the three individual respondents or Respondent Steel Factory Corporation had sufficient minimum contacts to satisfy the requirements of the due process clause as applied to the specific circumstances and facts of this case. In doing so, the District Court and the Tenth Circuit made very specific factual findings which would not likely be disturbed by this Court. *Easley v. Cromartie*, 532 U.S. 234 (2001) (stating U.S. Supreme Court rarely, if ever, overturns factual findings of a district court affirmed by a court of appeals). Simply put, Petitioner presented no evidence of contacts with the forum state on the part of the three individual respondents or Respondent Steel Factory.

As noted by both lower courts, a Petitioner has the burden of establishing that personal jurisdiction may be properly exercised over particular defendants. *Phillips*

USA, Inc. v. Allflex USA, Inc., 857 F. Supp. 789 (D. Kan. 1994). Prior to trial, when a motion to dismiss is decided on the basis of affidavits and other written materials, a Petitioner need only make a prima facie showing that the court may properly exercise personal jurisdiction over the defendants. *Carrothers Constr. Co. v. Quality Service & Supply, Inc.*, 586 F. Supp. 134, 135-36 (D. Kan. 1984). In ascertaining the facts necessary to establish jurisdiction, allegations in the complaint are accepted as true to the extent they are uncontroverted by submitted affidavits. *Phillips*, 857 F. Supp. at 791 (citing *Pytlik v. Professional Resources, Ltd.*, 887 F.2d 1371, 1376 (10th Cir. 1989); *Behagen v. Amateur Basketball Ass'n*, 744 F.2d 731, 733 (10th Cir. 1984), *cert. denied*, 471 U.S. 1010, 105 S. Ct. 1879, 85 L. Ed. 2d 171 (1985).

Initially, it is important to note that Respondent has attached an unrelated unpublished disposition out of the Arkansas Court of Appeals. *See Bill J. Cory v. Tom Keeling*, No. CA02-440 (Ark. 2003) (unpublished disposition). In that case, the Arkansas Court of Appeals determined that minimum contacts existed sufficient to warrant the application of the Kansas Long Arm Statute. However, that case involved a totally unrelated defendant and a totally unrelated transaction for the purchase of hay. Moreover, the Arkansas Court of Appeals has less experience with the Kansas Long Arm Statute than the United States District Court for the District of Kansas and the Tenth Circuit Court of Appeals.

Other than that opinion, Petitioner relies on the same unsupported assertions and misapprehensions he has asserted throughout this litigation.

A. Respondent Steel Factory Corporation

The two lower courts carefully examined the evidence to sift through these unsupported assertions and determine the facts underlying these claims. In so doing, the court determined that Respondent Steel Factory, the manufacturer of the component parts for the buildings, never did business in Kansas. Instead:

> "the record before the court shows that Midwest Steel (the Kansas independent dealer from whom Mr. Cory purchased the buildings) is an independently owned and operated business. There is no evidence that Steel Factory has any ownership interest in Midwest Steel. Moreover, there has been no showing that Steel Factory has any control over the business affairs of Midwest. In fact, plaintiff has filed to show that Steel Factory even conducted business with Midwest Steel. Rather, the materials before the court show that Midwest Steel sold its purchase order with plaintiff to Universal Steel Buildings of Kansas City, Missouri, and then placed the order with Steel Factory.

B. Inaccuracies in Petitioner's Brief Regarding the Corporate Entities Involved

Petitioner asks this Court to disregard the factual findings of the lower courts which is simply not warranted nor is it the general practice of the United States Supreme Court to disrupt the factual findings of two lower courts. *Easley v. Cromartie*, 532 U.S. 234 (2001) (stating U.S. Supreme Court rarely, if ever, overturns factual findings of a district court affirmed by a court of appeals). Petitioner inaccurately states the corporate relationships between the entities involved throughout his Petition. As noted in

the opinions of the Courts below, the evidence established that Respondent Steel Factory Corporation was not related to Midwest Steel nor was Midwest Steel acting as an agent for Respondent Steel Factory. *See Tenth Circuit Opinion in Petitioner's Brief* at B-11. Additionally, Petitioner inaccurately refers to Aztec Steel Buildings and Universal Steel of Pennsylvania as "sister corporations." Again, the careful review of the evidence plainly establishes that these companies are wholly separate from one another and are not "sister corporations."

Additionally, Petitioner refers to discovery produced by Respondent Aztec Steel Buildings, Inc. with regard to component parts shipped to Kansas as if this discovery evinced Respondent Steel Factory's contact with the State of Kansas. *See Petitioner's Brief* at p. 19. As the courts below determined, Petitioner's attempts to mix and mingle "the corporations" was not supported by the evidence.

Consequently, Petitioner's request for review of the "minimum contacts" analysis performed by the lower courts should be denied.

C. Individual Defendants

The overwhelming evidence presented in the two lower courts plainly establishes that Kansas lacked personal jurisdiction over the three individual respondents and Respondent Steel Factory Corporation in the present action. Again, Petitioner incorrectly requests that this Court overrule the factual findings of two lower courts. As repeatedly noted by this Court, factual findings affirmed in two lower courts will not be disturbed by the United States Supreme Court. *Easley v. Cromartie*, 532 U.S. 234 (2001) (stating U.S. Supreme Court rarely, if ever,

overturns factual findings of a district court affirmed by a court of appeals). Consequently, Petitioner's attempts to completely disregard those factual determinations and reargue his version of events in the United States Supreme Court.

The two courts below found that personal jurisdiction did not exist as to the three individual respondents as none of these individuals maintained residents, bank accounts, property or had any other contact with Kansas. Although Arnold Davis and Shawn Davis were corporate officers in Respondent Aztec Steel Buildings and Universal Steel Buildings of Pennsylvania, personal jurisdiction cannot attach to corporate officers merely based on their status as such. Petitioner simply has no evidence to support jurisdiction in Kansas for these individual defendants.

III. RICO STATUTE OF LIMITATIONS

The Tenth Circuit also affirmed the District Court's grant of summary judgment to the remaining Respondents in this action, Respondent Aztec Steel Buildings, Inc. and Respondent Universal Steel Buildings of Pennsylvania. In doing so, the Tenth Circuit Court of Appeals noted that regardless of whether it applied the "injury accrual" or the "injury occurrence" rule, Mr. Cory was out of time under the applicable limitations period when he filed his action in August of 2003. As noted by the Tenth Circuit Court of Appeals, "the crux of Cory's RICO claims is that defendants sold "defective buildings to take his money." *Tenth Circuit Court of Appeals Opinion* in Petitioner's Brief at p. B-13. Moreover, "Cory testified at disposition [sic] that he 'realized [he] had a problem when two buildings had blown

down.'" The Tenth Circuit Court of Appeals correctly determined that even under Respondent's separate accrual of injury" theory, Respondent's injuries occurred at the time of purchase in 1993, 1995 and 1996. Since suit was not filed until 2003, all of the RICO claims are barred by the four year statute of limitations. At any rate, Mr. Cory admitted he knew of the problems with the purchases in 1999.

While one of the buildings blew down in 2001, the Tenth Circuit Court of Appeals corrected the District Court's determination that the RICO action regarding that building was timely, holding that "Cory's injury was complete when he purchased the allegedly defective buildings and parts. The defendants' purported racketeering activities caused that injury and the wind revealed it by collapsing the buildings."

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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